

VU Research Portal

Deprivation of Liberty of Children in Light of International Human Rights Law and Standards

Liefwaard, T.

2008

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Liefwaard, T. (2008). *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*. [PhD-Thesis - Research and graduation internal, Vrije Universiteit Amsterdam].

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

E-mail address:

vuresearchportal.ub@vu.nl

CHAPTER 4

DEPRIVATION OF LIBERTY OF CHILDREN IN THE NETHERLANDS

4.1 INTRODUCTION

4.1.1 The Netherlands: Largely Below Sea Level and Secured by Dykes

The Netherlands, also known as Holland, is a small country in Western Europe, surrounded by Germany, Belgium and the North Sea. It has approximately 16.4 million inhabitants of which nearly four million are under the age of twenty.¹ On 1 January 2007 the Netherlands counted slightly more than 1.2 million children between the age of twelve, the MACR and eighteen, the age of majority (*cf* art. 1 CRC).² About 19% of the total population belongs to an ethnic minority³ and the most common ethnic minorities are from Turkey, Surinam, Morocco, and the Dutch Antilles and Aruba.⁴

The Netherlands is a constitutional monarchy with a parliamentary democracy. International Law forms part of the domestic legal system; the Netherlands has a ‘monistic legal system’. Provisions of international treaties are legally binding and can be directly applicable as soon as they are published (art. 93 of the Constitution).⁵ In addition, provisions of international law are superior to provisions of national law (art. 94 of the Constitution). Clearly, the Dutch Constitution represents a country with a close connection with the international legal order and places the Dutch government under the obligation to support and further the international rule of law (art. 90 of the Constitution).

In December 1994 the CRC was ratified and it entered into force for the Kingdom of the Netherlands (which includes the Dutch Antilles and Aruba) on 8 March

1 Statistics Netherlands (CBS) > population counter (www.cbs.nl, last visited 1 June 2008).

2 CBS Statline > Population by origin and generation, 1 January > 2007 (www.cbs.nl, last visited 1 June 2008).

3 Defined by CBS as: a person belonging to an ethnic minority is defined as every person with at least one parent born in a foreign country.

4 CBS Statline > Bevolking; kerncijfers naar diverse kenmerken (www.cbs.nl, last visited 1 June 2008).

5 According to the Netherlands Supreme Court, domestic courts must determine whether a provision of international law is directly applicable; the Netherlands Supreme Court, 30 May 1986, *NJ* 1986, 668. This, e.g. depends on the wording of the provision.

1995.⁶ A few reservations were made, one of which affects article 37 (c) CRC's requirement that a child deprived of his liberty must be separated from adults: 'The Kingdom of the Netherlands accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law have been met.'⁷ Under Dutch Law a child, who was sixteen or seventeen at the time he committed an offence, can be sentenced according to adult penal law (art. 77b Criminal Code; CrimCo). The reservation means that in such case, article 37 (c) CRC is not applicable and the child (sixteen or seventeen years old) can be placed in an adult prison to serve his sentence.⁸

Although the Dutch ratification of the CRC was rather late – the CRC entered into force in 1990 and 166 countries preceded the Netherlands – and could therefore not really be regarded as enthusiastic support or a warm welcome, children's rights have been gaining public (and arguably private) interests since then. While a lot still needs to be done,⁹ the CRC has had its impact, for example on legislation resulting in the adoption of the prohibition of violence in children's upbringing (art. 1:247 (2) Civil Code). In addition, the influence of the CRC is noticeable in the 2001 YCIA and the 2005 Youth Care Act. There also is an increased awareness of the CRC visible in the jurisprudence of district and higher courts¹⁰ and in the establishment of a Minister for Youth & Family, who has explicitly referred to the CRC as foundation for his policy programme 2007-2011.¹¹ Besides the CRC, the Netherlands has ratified all other conventions (and optional protocols) relevant in this study and addressed in Chapter 2. With regard to the ratification of the ICCPR, the Netherlands has made a reservation concerning article 10. Since 'ideas about the treatment of prisoners are so liable to change' it

6 Kingdom Act of 24 November 1994, *Bulletin of Acts and Decrees* 1994, 862; *Treaty Series* 1995, 92 (Act sanctioning the CRC).

7 Art. 2 Kingdom Act.

8 Regarding the Antilles and Aruba a reservation regarding art. 37 (c) CRC's requirement of separation of children from adults was made in case of shortage of cell capacity. Other reservations affect art. 40 CRC (the right to legal representation during criminal trial for minor offences) and art. 26 CRC (social security). The Dutch government has made interpretative statements regarding arts. 14, 22 and 38 CRC. See also Meuwese, Blaak & Kaandorp 2005, p. 15.

9 See, e.g. Wolhuis 2005 and 'Jaarbericht Kinderrechten 2008' of Defence for Children International and Unicef - the Netherlands (Annual Report on Children's Rights); see also Detrick *et al.* 2008, regarding violence against children deprived of their liberty, and a first response of the State Secretary of Justice; *Parliamentary Documents II* 2007/08 24 587 and 31 215, no. 263. See earlier Mijnaerends 2001, De Jonge 1998, Schalken 1997 and Doek 1995.

10 See, e.g. Ruitenberg 2003. Although, this study has not been followed up yet, the CRC has been increasingly referred to in courts' jurisprudence all through the country; see for more on the (impact of the) CRC in the Netherlands: Meuwese, Blaak & Kaandorp 2005.

11 Ministry for Youth and Families, *Alle kansen voor alle kinderen, Programma voor jeugd en gezin 2007-2011*, The Hague, September 2007 (Ministerial Policy Programme for Youth and Families).

wishes not to be bound by the obligations set out in paragraph 2 and paragraph 3 (second sentence) of this article.¹²

4.1.2 *The Dutch Juvenile Justice System: Some Historical Notes*¹³

The Dutch juvenile justice system dates from 1905 when the three ‘Child Acts’ entered into force.¹⁴ One of these acts was the penal law Child Act and when it entered into force, the Netherlands became one of the first countries that established a separate juvenile justice system, with a separate criminal law and criminal procedure for children (as part of the Criminal Code (CrimCo) and Code of Criminal Procedure (CCP)). A number of procedural rules were introduced: the hearing of juvenile cases behind closed doors, the compulsory presence of the child in court and the compulsory notice of the child’s parents to attend the trial before court. In addition, a lawyer had to be appointed to represent the child and information had to be gathered about the child’s character and living conditions. Under the penal law Child Act the child usually appeared before a single judge, unless the child was prosecuted for very serious offences.¹⁵

Courts were given three new penalties at their disposal, exclusively for children – reprimand, small fine and borstal – and one educational measure, which entailed the child being sent to a state or privately run house of correction for a longer period.¹⁶ Of particular significance was the deletion of the MACR. Throughout history, it had been common practice to punish children less severely than adults or not to punish them at all and children under a certain age were often immune from prosecution (e.g. children under the age of ten in the 1886 Penal Code). After 1905 all children alleged of committing crimes could be prosecuted and subsequently punished under the juvenile justice system (this lasted until 1965).

¹² Art. 2 Kingdom Act of 24 November 1978, *Bulletin of Acts and Decrees* 1978, 624 (Act sanctioning the ICCPR); entry into force 11 March 1979, *Treaty Series* 1978, 177. As pointed out in Chapter 2 the absolute wording of art. 10 (2) and (3) ICCPR has led to many reservations.

¹³ It goes beyond the scope of this study to fully elaborate on the historical context of the Dutch juvenile justice system; these historical notes are based on Weijers & Liefwaard 2007 and Weijers & Liefwaard 2007a & 2007b; cf Doek & Vlaardingerbroek 2006, p. 416ff, De Jonge & Van der Linden 2004, p. 39ff and Weijers 2000, p. 55ff.

¹⁴ Acts of 12 February 1901, *Bulletin of Acts and Decrees* 1901, nos. 62, 63 and 64 (entry into force 1 December 1905).

¹⁵ In 1922 the juvenile judge was introduced (‘kinderrechter’, according to the American example; see, e.g. Bac 1998) together with the family supervision order (‘ondertoezichtstelling’), which could, until 1995, also be imposed in the context of juvenile justice.

¹⁶ In addition, the court could return the child into parental custody, without sentencing him. It goes beyond the scope of this study to elaborate on the differences between State and private (non-profit) institutions, but the latter have had a specific role in the juvenile justice and child protection system from the beginning. The distinction still exists (art. 3a (2) YCIA).

The other two acts were the civil law Child Act and the Children (Framework) Act.¹⁷ The adoption of the three Acts together is exemplary for their strong interrelationship. Since their introduction in 1905 there has been a strong connection between the juvenile justice system and child protection system. It is argued that fear for delinquent youth was the primary motive for the introduction of the Child Acts.¹⁸ In addition, the child's family was on the one hand regarded as the ideal place of the upbringing of the child, but on the other as a potential threat. Delinquent behaviour of children was mainly attributed to the failing pedagogical climate in which they grew up. As a consequence the response to such behaviour often led to the child's removal from his family and community to an institution somewhere in the country. The strong connection also affected the enforcement of measures of child protection and juvenile sanctions in (the same) youth institutions (see below).

Throughout the 20th century, particularly after World War II, a number of significant adjustments were made to the Child Acts, influenced by a change of view regarding the child, the child and his family, juvenile justice approaches and policies, and by the growing attention of the rights of the child and child offender. For the juvenile justice system this resulted *inter alia* in the reintroduction of an MACR in 1965 (set at the age of twelve), the introduction of the penalty of placement in a reformatory school ('tuchtschoolstraf') and an additional measure of placement in an institution for special treatment ('plaatsing in een inrichting voor buitengewone behandeling; p.i.b.b.').

The most comprehensive law review took place in 1995. It aimed at modernizing and simplifying the juvenile legal system and improving efficiency.¹⁹ It represented the recognition of the child as bearer of rights, entitled to similar legal safeguards as adults and of the child as more mature than before; the child was regarded as being 'more assertive'. This presumption of the increased maturity of children and that children could consequently be held more responsible for their own actions, led *inter alia* to a doubling of the maximum custodial penalty. The 1995 law review led to a simplification by reducing the number of principle penalties to two: the fine and youth imprisonment ('jeugddetentie'). In addition, one penal custodial measure was created: the measure of placement in an institution for juveniles ('maatregel tot plaatsing in een inrichting voor jeugdigen – PIJ-

17 The latter will be addressed in para. 4.1.4. The civil law Child Act gave courts the power to relieve or divest parents of their parental authority, if the child was growing up in circumstances in which it was threatened 'with moral or physical ruin'; Weijers & Liefwaard 2007, p. 128. This act was revolutionary since it was introduced to place statutory limits upon parental authority. See also Doek 1972 and Bruning 2001.

18 De Rooy 1982, p. 114.

19 In addition, the 1995 law review was influenced by international human rights developments, e.g. the jurisprudence of the ECtHR.

maatregel'; hereinafter referred to as the 'treatment order'). Furthermore, the community service order was introduced as an alternative sanction,²⁰ and a legal basis for diversion by the police was introduced, aiming at the codification of the diversion programme called 'HALT' (see below).

The 1995 law review did not change the specific rules of the criminal procedure for children (i.e. hearings *in camera* before a juvenile judge or court; compulsory presence of the child and compulsory notification of parents; court appointed lawyer; specific attention for the child's personal circumstances; a specific role for the Child Care and Protection Board), although they were subject to debate.

4.1.3 Sanctions and Settlements under the Juvenile Justice System

Currently (in 2008) the Dutch CrimCo still contains the 1995 set of youth sanctions (penalties/sentences and measures) under the juvenile justice system, which scope is determined by the 'crime date criterion' (art. 77a CrimCo).²¹ The court can sentence children to a community sanction order (community service and/or training order) for a maximum duration of 240 hours or a fine up to €3,700.-. It can also impose youth imprisonment for a maximum duration of twelve months regarding children who were between twelve and fifteen years when they committed the crime, or 24 months regarding children of sixteen or seventeen years.²² Furthermore, it can order a child's treatment for two years (treatment order), which can be prolonged up to a maximum of six years.²³ The latter two sanctions generally lead to the child's deprivation of liberty (see also para. 4.2).

On 1 February 2008 the legislator introduced a new penal measure meant to influence the child's behaviour ('gedragsbeïnvloedende maatregel'; see para. 4.1.8).

As mentioned above, the CrimCo provides a legal basis for diversion by the police (art. 77e CrimCo); it also stipulates that the Public Prosecutions Office is competent to offer the child a transaction, which diverts him from further prosecution (i.e. a trial before a court; art. 77f jo. 74 CrimCo). Diversion or 'out-of-court settlement' has been part of the Dutch juvenile justice system for a long time. The flagship of diversion is the HALT-programme referring to 'Het ALTERNatief' (in English: 'the alternative'), which started in Rotterdam in 1981. It is a modality of community service or a training programme of a maximum duration of twenty hours, which can

²⁰ In 2001 it became a principle penalty.

²¹ Cf para. 3.7.

²² Children of 16 or 17 can be sentenced under adult penal law; art. 77b CrimCo; young adults of 18, 19 or 20 years can be sentenced under juvenile criminal law (art. 77c CrimCo).

²³ Arts. 77h and 77s CrimCo. There are some additional penalties and measures and the court can also combine different sanctions.

be offered by the police to the child and his parents.²⁴ It is primarily meant for first offenders and for certain specific offences laid down in the Decree Designation HALT-offences ('Besluit aanwijzing HALT-feiten').²⁵ Although, HALT was originally meant as a quick response to children who committed minor offences, in particular letting off fireworks, its scope of application has been widened and currently also includes more severe offences such as simple theft or vandalism.²⁶

If the police send the case to the Public Prosecutions Office, because the HALT criteria are not met (e.g. the child is a persistent offender or the alleged offence is too severe), the child (or his parents) refused participation, or the programme has not been completed,²⁷ the latter can also decide to offer the child a transaction, which diverts him from further prosecution.²⁸ Such transaction (referred to as diversion as part of the Public Prosecutions Model) can either be a form of community service for a maximum of 40 hours or a fine up to €3,700.-.²⁹ It can also include the instruction that the child should follow the instructions of the youth probation service for a maximum of six months. In light of this transaction authority, it is interesting to note that the Public Prosecutions Office has adopted the general policy of 'community service order, unless...'. This general policy also applies to prosecution before a court and implies that the office in general strives for a settlement within the community, rather than depriving a child of his liberty.³⁰

4.1.4 Some Facts and Figures regarding Settlements under Juvenile Criminal Law

By way of introduction, it is interesting to take a brief look at some figures regarding (responses to) youth crime and delinquency in the Netherlands, more

24 It takes place under the authority of the Public Prosecutions Office. Parents of children under the MACR ('under-twelves') who have committed offences can be offered a 'STOP-reaction', a community service programme of a maximum of 10 hours; STOP is meant as a form of pedagogical support to parents; cf. Instruction Under-twelves, including STOP-reaction, *Government Gazette* 2004, 248 (Aanwijzing 12-minners, inclusief Stop-reactie).

25 Decree of 25 January 1995, houdende aanwijzing van de strafbare feiten als bedoeld in artikel 77e, eerste lid, van het Wetboek van Strafrecht (Besluit aanwijzing Halt-feiten), *Bulletin of Acts and Decrees* 1995, 62 (Decree Designation HALT-offences).

26 HALT is not free from critique and is currently under review. Recent research has pointed out that its added value can be questioned; Ferwerda *et al.* 2006. Weijers has argued to abolish the programme; Weijers 2008.

27 The police can also warn the child without resorting to any further proceedings or offer him a police transaction (a fine) in the event of a minor offence (or misdemeanor).

28 The office can also decide to dismiss the case or to prosecute the child before a court; it has the sole right to exercise prosecutorial discretion; art. 167 CCP.

29 If the child is offered such a transaction he is entitled to a court appointed lawyer; art. 489 (1) CCP.

30 Instruction Effective Settlement Juvenile Justice Cases, *Government Gazette* 2005, 66 (Aanwijzing effectieve afdoening jeugdstrafzaken).

specifically regarding the just mentioned sanctions and other forms of (out-of-court) settlement under the juvenile justice system.³¹

The exact scope of youth crime and delinquency is unknown. In general, it is assumed that youth crime in the Netherlands has neither increased nor decreased significantly during the past years.³² Still, there are some general developments that are worth mentioning. In 2006 the police interrogated 70,400 children between the age of twelve and seventeen, who were under the suspicion of having committed a crime (art. 27 CCP); an increase compared to the 65,000 child suspects in 2005. If one looks at earlier figures (47,600 in 2000, 41,400 in 1995 and 38,300 in 1990) there has been an increase in the number of children interrogated by the police by almost 85% since 1990.³³ One cannot be absolutely certain about the causes of this increase, but it certainly is caused neither by the demographic changes,³⁴ nor by an increase in juvenile delinquency only; a combination of these and other factors (such as increased attention for and higher prioritization of juvenile delinquency) seems likely.³⁵

Boys represent the majority of the children interrogated (58,100 in 2006; 83%), but the share of girls has been growing from less than 10% in 1980 (4,100) to more than 17% in 2006 (12,300). The majority of the children interrogated in 2006 were under suspicion of committing property offences (40%); 32% were under suspicion of committing crimes affecting vandalism or public order and 21% of committing violent crimes. The trends in this regard reveal that property offences have always represented the largest group, followed by the other two groups in the same sequence. However, the latter two have constantly been increasing compared to the property offences. The increase of violent crimes seems to be caused primarily by an increase in the number of children under suspicion of assault or threat (of violence).³⁶

Thus, although it is hard to be precise regarding the volume of youth crime, according to police and prosecution figures it is likely that youth crime has been

31 See further, e.g. Van der Heide & Eggen 2007; see also Van der Laan 2005 and Junger-Tas 2004.

32 Van der Laan 2005, p. 992 and 1009; see also Junger-Tas 2004.

33 Van der Heide & Eggen 2007, table 4.24.

34 In the period of 1995-2006 the total population of children between 12 and 17 years increased by 10%, while the number of children interrogated by the police increased by 70% in that period; Van der Heide & Eggen 2007, p. 129-130.

35 See also Doek & Vlaardingerbroek 2006, p. 425. Doek & Vlaardingerbroek refer to research based on self-reports, which reveals a slight increase of self-reported delinquent behaviour between 2001 and 2004; *Ibid.*, p. 425 with reference to Blom, Van der Laan and Huybrechts 2005, p. 37-44. Cf Van der Laan 2005, p. 992 who finds support in the system of self-reports that youth crime has neither increased nor decreased significantly during the 1990s.

36 Eggen, Van der Laan & Bogaerts 2007, p. 130 and 133; see also Van der Heide & Eggen 2007, table 4.30.

rather stable in the past quarter of a century; at the same time it has become more violent to some extent.³⁷

As mentioned above, 70,400 child suspects were interrogated by the police in 2006. In the same year more than 22,000 cases were settled by the police through HALT.³⁸ In 2006 the Public Prosecution Office registered more than 36,500 cases concerning child suspects.³⁹ There has been an increase in the number of registered cases since 2001, an increase which correlates with the increase in the number of child suspects interrogated by the police.⁴⁰ Every year generally two-thirds of the registered cases are settled by the Public Prosecutions Office by offering a transaction or by a decision not to prosecute (dismissal).⁴¹ In 2006 this affected slightly more than 24,000 cases (*cf* 2000 in which year less than 18,000 cases were settled by the office). Besides this increase in absolute numbers, it is interesting to note that during the years there has been an increase of transactions (almost 50% in 2000; two-thirds in 2006), while the number of dismissals decreased (from one-third in 2000 to about 20% in 2006). This increase in transactions could be caused by the fact that the police better filter the cases that are likely to be dismissed (due to the lack of figures in this regard this is difficult to tell) or by a change of policy of the Public Prosecutions Office to increase the number of prosecutorial responses to registered cases. In this regard, it is worth mentioning that the increase in transactions offered by the Public Prosecutions Office corresponds with the increase in the number of transactions in the form of a community service or learning project, which seems to be related to the policy 'community service, unless...' (see para. 4.1.3).⁴²

In 2006 more than 12,400 cases, which is just one-third of the cases registered at the Public Prosecutions Office (and only 18% of the police cases), were prosecuted

³⁷ Van der Laan 2005, p. 989 and 1009-1010. Van der Laan also observes that most of the suspects interrogated by the police are 18, 19 or 20 years of age; he considers that there may be too little attention paid to this group.

³⁸ Van der Heide & Eggen 2007, table 5.22. Only 820 of these projects were unsuccessful (i.e. not completed; table 5.23). In 2006 nearly 2,000 'STOP programmes' were conducted.

³⁹ Doek & Vlaardingerbroek rightfully point at the absence on figures regarding the police dismissals (with or without warning); Doek & Vlaardingerbroek 2006, p. 431 and 454. Based on the fact that there were 70,400 children interrogated by the police, 22,000 HALT projects and 36,500 cases registered by the Public Prosecutions Office, one could estimate the number of cases dismissed by the police with or without an official warning at approximately 12,000. See Doek & Vlaardingerbroek 2006, p. 431 for a similar estimation regarding 2004.

⁴⁰ De Lange, Van der Laan & Bogaerts 2007, p. 169.

⁴¹ 14,703 cases (61.2%) resulted in a transaction (42.8% of which resulted in community service of a maximum of 40 hours; art. 77f CrimCo); 4,873 cases (20%) were dismissed for various reasons; Van der Heide & Eggen 2007, table 5.27.

⁴² De Lange, Van der Laan & Bogaerts 2007, p. 171-172.

before a court.⁴³ Although, the number of court cases has been increasing since the new millennium (and before), this proportion (two-thirds settled by the Public Prosecutions Office against one-third by the courts) has been representative during the years; the absolute increase seems to be caused by the increase in the number of interrogations by the police.⁴⁴ The settlements by the district courts resulted in approximately 92% of the cases in conviction (11,417 cases); in 927 cases the child was acquitted or discharged from prosecution.⁴⁵

In 2006 the district courts imposed 16,762 sanctions, a decrease compared to 17,583 in 2005 and 17,502 in 2004. Of the total sanctions in 2006, 8,656 were community service orders (51%; community service or training order) and 519 were fines (3%). Slightly more than a quarter (27%; 4,552) resulted in the sentence of youth imprisonment; a treatment order was imposed 239 times (1.4%). During the period of 2000-2006 there has been a steady increase in the number of community service orders (from 5,359 to 8,656) and a fluctuation in the number of youth imprisonments, which decreased in particular during the past three years (from 5,901 in 2004 to 4,552 in 2006). The number of treatment orders in 2006 was also lower than in 2005 (286) and 2004 (250). Although it is too early to speak of a decreasing trend, the increase in the (absolute) number of cases during the past few years has not led to an increase in sanctions resulting in (suspended) deprivation of liberty.

A decreasing trend certainly is visible regarding the imposition of (adult) imprisonment under article 77b CrimCo, permitting the sentencing of sixteen or seventeen year olds under adult penal law. In 2006 the district courts ordered 128 prison sentences under adult penal law, which is a significant decrease compared to 2000 (279).⁴⁶

In 1,957 cases the courts imposed a (partly) non-suspended youth imprisonment, of which 26% had a duration of one to two months. Only 11% resulted in a non-suspended youth imprisonment of six months or more. Almost 70% of the youth imprisonments last no longer than 3 months.⁴⁷ According to recent information provided by the Minister of Justice only twenty non-suspended youth imprisonments were imposed for a duration of one year or more in 2006.⁴⁸ The Minister has observed an increase in the number of relatively short youth

⁴³ Van der Heide & Eggen 2007, table 5.24.

⁴⁴ De Lange, Van der Laan & Bogaerts 2007, p. 173.

⁴⁵ Van der Heide & Eggen 2007, tables 5.30 and 5.31.

⁴⁶ *Ibid.*, table 5.34. Note that De Lange, Van der Laan & Bogaerts 2007, p. 175ff mistakenly refer to the figures of 2004 while drawing conclusions regarding 2006. Cf Weijers 2006.

⁴⁷ Van der Heide & Eggen 2007, table 5.35.

⁴⁸ *Parliamentary Documents II* 2007/08, Appendix of Proceedings, no. 1470, p. 3147-3148 (Governmental response to Parliamentary questions).

imprisonments (between 1998 en 2006); at the same time there has been an increase in the total number of youth imprisonments, which altogether justifies the conclusion that the total number of years in youth imprisonment has increased from 326 in 1998 to 410 in 2006.⁴⁹

In conclusion, most of the cases are diverted from the courts, either by the police or by the Public Prosecutions Office, which can be acclaimed warmly in light of article 40 (3)(b) CRC, calling upon States Parties to settle, whenever appropriate and desirable, juvenile criminal cases without resorting to judicial proceedings. In addition, more than 50% of the court cases result in a community service order. The use of sentences leading to (non-suspended) deprivation of liberty has not been increasing in the past years, despite the overall increase in the number of cases. However it is too early to speak of a decreasing trend. Still, non-suspended youth imprisonments of a period longer than six months tend to be limited to around 10% and more than half of the youth imprisonments are suspended with imposed conditions. These figures should be taken into account when approaching the large increase in the number of children in institutions, which will be addressed below.

4.1.5 Some Historical Notes regarding Youth Institutions⁵⁰

The juvenile justice system included from the beginning in 1905 separate (penal) facilities for children with their own regime, aim and inspection arrangements laid down at national level. The third 1901 Child Act, the Child Framework Act, provided that the enforcement of the measures and sanctions of the two other Child Acts would be geared to protecting minors and providing correctional education for them.⁵¹ *De facto*, however, there was hardly any specific attention for the position of children in borstals and other educational and/or correctional facilities. Institutional life in that period was characterized by boys with their heads shaved, girls with conspicuous headwear, identifying them as belonging to an institution, all children wearing institutional uniforms, overpopulation, lack of educational expertise among staff and a strong emphasis on discipline. The institutions themselves were in such a bad state that the then General Supervisory and Advisory Board for the National System of Borstals and Correctional Institutions concluded that the pedagogical intentions of the Child Acts were not realized.⁵²

⁴⁹ According to the Minister this points out that in general the severity of sanctions has increased. He was challenged to provide this information by a member of parliament who had raised questions regarding the assumed soft approach against juvenile offenders.

⁵⁰ Again these notes are primarily based on Weijers & Liefwaard 2007; see para. 4.1.3.

⁵¹ As mentioned in para. 4.1.3 there has been a strong connection between (civil) child protection and juvenile justice from the very beginning, which also affected the enforcement of measures of child protection and juvenile sanctions in (the same) youth institutions; a practice which currently (i.e. 2008-2010) is subject to change (see para. 4.1.8).

⁵² Delicat 2001, p. 51; Weijers & Liefwaard 2007, p. 135-137.

Particularly after World War II, the personality of the individual child and the particular problems of adolescents gained attention resulting – briefly – in a growing awareness that institutions should link up with the child’s evolving capacities (i.e. growing independence and responsibility). This increasing awareness impacted on the design of institutions and on institutional regimes and resulted *inter alia* in more emphasis on the quality of life in institutions. Children had to stay in small groups with a certain ‘familiarity’ (the principle that children stay in groups had already been introduced in 1905 but had never really been implemented) and both group homes and individual cells had to have a homelike character. This included a child having personal affects. In addition, there was increased attention for the design of institutions and for contact between children in institutions and the community.

Still, solitary confinement has been continuously present since the 1901 Child Framework Act, although it was increasingly losing support. Under the Child Act solitary confinement could be part of the regime or used as a disciplinary punishment. Confinement for a month on admission was the rule (i.e. part of the regime) rather than the exception; as a punishment it was limited in time (four days for children under the age of fourteen,⁵³ eight days for fourteen to eighteen year-olds and a maximum of sixteen days for those over the age of eighteen).⁵⁴ Later, in the 1960s and 1970s, confinement as part of the regime increasingly fell into discredit and it was used more as a measure of order rather than to punish children, which resulted in its legal abolition as a disciplinary sanction in 1982. In general, it was argued that one no longer needed disciplinary punishments, because pedagogical measures were considered satisfactory.

The abolition of solitary confinement and other disciplinary sanctions also formed part of the growing awareness of the rights of children. Although the rights of adult prisoners were already recognized to a certain extent by 1953, it took until the 1980s before the legal status of children deprived of liberty was addressed at the national level. The 1965 Child Care and Protection (Framework) Act⁵⁵ (‘Beginselenwet voor de Kinderbescherming’), replacing the 1901 Child Framework Act and amending the juvenile justice provisions of the CrimCo and CCP, already contained a few elements of the legal status of children in institutions, concerning children’s stay in groups, practice of religion, pocket money and transfer to a hospital for treatment if necessary (arts. 22-26). The Act, however, also contained a specific regulation regarding solitary confinement, which could be considered an aggravation compared to the 1901 Child Framework Act; the maximum duration for children of fourteen and older was extended to two weeks (art. 25).

⁵³ Note that there was no MACR.

⁵⁴ There were other disciplinary measures, such as the measure of being locked up in shackles or lockup on bread and water (both limited in time depending on age) or withdrawal of privileges.

⁵⁵ Act of 9 November 1961, *Bulletin of Acts and Decrees* 1961, 402 and 403.

In 1982 the Child Care and Protection (Framework) Act was changed⁵⁶ and disciplinary sanctions were deleted (as mentioned above); in addition, a complaints procedure for children was introduced, including the provision that each State institution had to have a supervisory committee (art. 26a ff). This law review was followed by the adoption of a regulation (i.e. a decree not a statutory law) regarding the (substantive) legal status of children in State institutions for child protection, containing – for the first time – detailed rules regarding many aspects of institutional life. In 1989 and 1990 the legal status of children in institutions was further elaborated in the Youth Services Act ('Wet op de jeugdhulpverlening') and the Judicial Child Care Institutions Decree ('Besluit regels inrichtingen voor justitiële kinderscherming'), respectively; *inter alia*, the maximum duration of confinement as a pedagogical measure was lowered.⁵⁷

The most significant accomplishment dates from 2001, the year in which the Youth Custodial Institutions Act (YCIA) was introduced, providing for one, comprehensive statutory legal framework regarding the (substantive and procedural) legal status of children in youth institutions. The YCIA, which entered into force on 1 September 2001,⁵⁸ can be seen as the ultimate recognition of rights of children deprived of their liberty in youth institutions, since one of its primary objectives was to strengthen the legal status of these children. The YCIA also reintroduced disciplinary sanctions, which was defended by the assumed increased maturity of the child, justifying the child's personal responsibility for his acts (*cf* the assumptions of the 1995 juvenile justice law review). In addition, the legislator wanted to draw a clear line between disciplinary sanctions and (pedagogical) measures of order, which were *de facto* used for disciplinary reasons as well (see further para. 4.9).⁵⁹

As mentioned in Chapter 1, the YCIA will be particularly addressed in this chapter. By way of introduction it is worthwhile to take a closer look at general trends and specific characteristics of (placement of) children in youth institutions first.

⁵⁶ *Bulletin of Acts and Decrees* 1982, 273.

⁵⁷ Act of 8 August 1989, *Bulletin of Acts and Decrees* 1989, 358, resp. *Bulletin of Acts and Decrees* 1990, 112. In addition, it widened the scope of applicability to all institutions designated for juvenile justice and child protection. Previously, only State institutions were covered; private youth institutions had their own regulations.

⁵⁸ Act of 2 November 2000, *Bulletin of Acts and Decrees* 2000, 481.

⁵⁹ *Parliamentary Documents II* 1998/99, 26 016, no. 3 (Explanatory Memorandum YCIA), p. 61. Disciplinary sanctions and measures of order differ by nature.

4.1.6 General Trends regarding Children in Youth Institutions and Some Specific Characteristics

Since 2005 there have been fourteen youth institutions in the Netherlands with a capacity to house as many as roughly 2,760 children in 2007.⁶⁰ Youth institutions can be divided between remand homes ('opvanginrichtingen') and treatment centres ('behandelinrichtingen'), respectively with a capacity of approximately 1,250 and 1,500 children. Remand homes are designated for pre-trial detention, youth imprisonment, children waiting for placement in a treatment centre (either under juvenile criminal law (treatment order) or under (civil) child protection law) or for child refugees awaiting expulsion, placement in a psychiatric hospital or who are detained for disobeying a court order (art. 9 (2) YCIA). Treatment centres are meant for children under a (penal) treatment order or children in need of treatment under (civil) child protection law (art. 10 YCIA). This shows that, although subject to change, children under both the juvenile justice system and child protection system are placed in youth institutions.⁶¹

The end of the 20th Century witnessed a large increase in the capacity of youth institutions and the number of incarcerated children – a development which sharply contrasted the rather stable situation after World War II.⁶²

[Invoegen figure 4.1]

⁶⁰ See figure 4.1 and table 4.1 (figures provided by DJI, Sector Youth). Some of the institutions have become (or are currently in transition to become) institutions for closed youth care, an operation that started on 1 January 2008 and is planned to be finished in 2010 (see para. 4.1.8). The data presented in this paragraph relates to the period before 1 January 2008.

⁶¹ See para. 4.2 for the different forms of deprivation of liberty of children in the Netherlands.

⁶² Weijers & Liefwaard 2007, p. 152.

Table 4.1 – Total capacity of youth institutions per year

<i>Year</i>	Remand home	Treatment centre	Total capacity
1983	229	425	654
1984	234	425	659
1985	240	420	660
1986	260	420	680
1987	261	420	681
1988	263	380	643
1989	289	380	669
1990	320	402	722
1991	340	462	802
1992	360	472	832
1993	350	496	846
1994	366	522	888
1995	401	644	1045
1996	457	757	1214
1997	575	835	1410
1998	623	905	1528
1999	650	1050	1700
2000	813	1093	1906
2001	979	1143	2122
2002	1050	1296	2346
2003	1091	1308	2399
2004	1184	1382	2566
2005	1151	1428	2579
2006	1285	1468	2753
2007	1236	1522	2758

Source: Figures Capacity DJI, sector Youth

As figure 4.1 and table 4.1 show, there were approximately 650 places in youth institutions in the early 1980s. The number of places has continually increased since then, especially since 1995, to some 2,760 places in 2007, an increase of more than two hundred percent. Over the last decade alone, the number of places increased two and a half times.⁶³ The sharp increase since 1995 seems to be influenced by the law

⁶³ The dynamic rise in the overall population of children in youth institutions does not stand on its own. Since the mid-1980s the total Dutch prison population per 100,000 inhabitants increased more than 200%; this amounts to an increase that has not even been recorded in the US and has lifted the Dutch prison population almost to the same height as the UK and Australia; DJI Annual Report 2006, p. 51; Cf World Prison Population List (7th Edition). According to Boone &

revision in the juvenile justice system in that year (see para. 4.1.3) leading *inter alia* to a doubling of the maximum duration of youth imprisonment. This can be confirmed by a decrease in the share of children under the child protection system in youth institutions in the second half of the 1990s.

However, this group of children (under child protection law) contributed significantly to the (continuing) increase at the beginning of the new millennium. The share of the group of children under child protection law in youth institutions grew particularly in 2001 and 2002.⁶⁴ The reason for this was twofold. First, the authorities responsible for the placement did their utmost to place these children within one week, in accordance with the 2001 covenant between the government and Youth Care Agencies.⁶⁵ In addition, there was a(n) (increased) lack of alternatives to institutional placement, due to large cutbacks in the late 1980s and early 1990s, which contributed to the growing demand for placement in youth institutions.⁶⁶

The above mentioned developments are particularly visible if one looks at the capacity utilization of youth institutions according to the legal grounds for placement. In general the population of youth institutions has been since 2002, composed of about 50% of children under child protection law and 50% of children under juvenile criminal law.⁶⁷ The former group of children represented the majority in 1990, 59%, and the minority in the late 1990s: 41% in 1998 and 1999. At the beginning of the new millennium its share increased to 53% in 2003 and has remained rather steady since (50% in 2004 and 2005; 52% in 2006).⁶⁸

In treatment centres, children under child protection law represented at the beginning of the 1990s almost 90% of the population, but their share slimmed

Moerings the increase in the incarceration rates is mainly caused by the rising figures of specific categories of prisoners, such as refugees and asylum seeking individuals, adults sentenced to a hospital order under criminal law and children deprived of liberty. The Netherlands used to be a country known for its tolerant attitude towards deviant behaviour. However, it has become a country that solves its problems with minorities by means of incarceration; Boone & Moerings 2007, p. 73-74.

⁶⁴ Spaans 2003, p. 5 and 16-18.

⁶⁵ Covenant *Crisisplaatsingen OTS-pupillen in justitiële jeugdinrichtingen*, July 2002 (Covenant regarding placements of children (in crisis) in youth institutions, under child protection law).

⁶⁶ *Appendix to Proceedings II* 2002/03, no. 1800, p. 3770; Cf YCIA Evaluation 2004, p. 73-74.

⁶⁷ There has also been an increase in the number of family supervision orders in the past years (i.e. the legal foundation of placement in a youth institution). On 31 December 2005 there were almost 24,000 children under family supervision (cf 2004: 22,200; 2000: almost 21,000; 1998: almost 19,500) and 7,701 children were placed under family supervision in that year (cf 2004: 6,745; 2000: 5,513; 1998: 5,447); www.cbs.nl (last visited: 1 June 2008). The Council for the Judiciary ('Raad voor de Rechtspraak') noted a significant increase (13%) of requests for family supervision orders in 2006 (a similar increase was noted in 2005); Annual Report The Council for the Judiciary ('De Rechtspraak') 2006, p. 30.

⁶⁸ Van der Heide & Eggen 2007, table 6.15.

significantly to nearly 74% in 1995. Currently (i.e. the past decade), the share of children placed in the context of child protection fluctuates at around 65%.⁶⁹

Consequently, the overall rise in the number of ‘child protection children’ in youth institutions must have been caused by an increase in their share in remand homes. This can be confirmed by the following figures showing a decrease in the number of children placed in remand homes under juvenile criminal law, in particular those in pre-trial detention, clearly in favour of children under child protection law. In 1990 80% of the population of remand homes were ‘juvenile justice children’ and 20% ‘children protection children’; in 1999 the proportion was 90% and 10%, respectively. Since 2000, however, the share of children under child protection has been growing from 14% in 2000 up to 40% in 2006.⁷⁰

Thus, the overall increase of children in youth institutions in the past decades was first caused by the 1995 revision to the juvenile criminal law, followed by the growing demand for places for children under (civil) child protection law, particularly in remand homes.⁷¹

On average 90-95% of the total capacity of youth institutions is occupied, although there has been some decline in the past few years (2004-2006), which may have some impact on the figures regarding capacity utilization provided above.⁷² Furthermore, of the 7,313 children that were present in youth institutions in 2006, 4,726 fell under the juvenile justice system and 2,440 under the child protection system.⁷³ The higher number of ‘juvenile justice children’ that flow through youth institutions is related to the relatively short duration of their stay compared to the ‘child protection children’.⁷⁴

⁶⁹ Van der Heide & Eggen 2007, table 6.21.

⁷⁰ *Ibid.*, table 6.20. Of all ‘juvenile justice children’ placed in remand homes in the context of juvenile justice in 2006 (60%), 40% were pre-trial detained, 10% were sentenced to youth imprisonment and 10% were placed under a treatment order waiting for an appropriate place in a treatment centre. Regarding children in pre-trial detention it is interesting to note that the crimes for which they are detained have changed rather dramatically over the course of time; in 1991 50% of the children were prosecuted for property offences (without violence) and 45% for violent crimes against individuals; in 2006 only 21% were prosecuted for a non-violent property offence, while 71% were for violent crimes against individuals; *Ibid.*, table 6.19. *Cf* para. 4.1.4.

⁷¹ See also Weijers & Liefwaard 2007. It is important to reiterate that the majority of the children in the juvenile justice system is diverted, which could prevent their deprivation of liberty; see para. 4.1.4.

⁷² Van der Heide & Eggen 2007, table 6.15; *cf* DJI Annual Report 2006, p. 49.

⁷³ DJI ‘Facts in figures’ (www.dji.nl, last visited 1 June 2008). The other children were child refugees or asylum seeking children in detention.

⁷⁴ Recently the State Secretary of Justice mentioned that the average duration of pre-trial detention is 26 days (most likely in 2007). She also noted that 65% of the children who have been in pre-trial detention, will not be placed in a youth institution after disposition; *Parliamentary Documents II* 2007/08, no. 24 587 and 31 215, no. 263, p. 2.

A closer look into some of the characteristics of placement of children in Dutch youth institutions illustrates that the population in the past few years consisted of approximately 75% boys and 25% girls. The share of girls in remand homes increased in the past decade, from less than 10% in 1995 up to 22% in 2006; their share in treatment centres has been fluctuating around 30% during the past fifteen years.⁷⁵

The vast majority of children in youth institutions are sixteen or seventeen (in 2006: 49%). Children of the age of fourteen and fifteen represented 24% in 2006. Regarding children of eighteen and older, it is interesting to note that their share has increased from 10% in 1991 to 23% in 2006.⁷⁶ In 2006 4% of the children were thirteen or younger – an average percentage during the past fifteen years. In general, the average age of children in treatment centres is higher than in remand homes (in 2006 30% of the children in treatment centres were eighteen or older; in remand homes this percentage remained at 15%).⁷⁷

Although, the MACR in the Netherlands is set at the age of twelve, which serves as the minimum age for deprivation of liberty in the context of juvenile justice, ‘under-twelves’ can (still) be placed in youth institutions under child protection law.⁷⁸ Unfortunately, there are no specific figures published on the number of children under the age of twelve. According to information acquired from the Dutch National Agency for Correctional Institutions (‘Dienst Justitiële Inrichtingen’; hereinafter also referred to as the DJI) there were ‘under-twelves’ in youth institutions between 1999 and 2007, although the numbers were small (varying from 1 child in 1999 to 7 children in 2002 and 3 in 2007).⁷⁹

Furthermore, it is interesting to note that approximately 60% of the children in youth institutions belong to an ethnic minority.⁸⁰ The percentages in this regard have been fluctuating in the past fifteen years; in 1998 almost two-thirds of the children were from another ethnicity; in 2005 it was slightly more than 50%. In treatment centres there has been an increase of more than 10%, from 38% in 1991 to 49% in 2006; remand homes face a decrease in this regard of about 10% (from 70% to 60%).⁸¹

⁷⁵ Van der Heide & Eggen 2007, tables 6.20 and 6.21.

⁷⁶ Due to the ‘crime date criterion’ children sentenced under the juvenile justice system may have turned eighteen during the trial or execution of their sentence; *cf* para. 4.2.

⁷⁷ *Ibid.*, tables 6.15, 6.20 and 6.21. It is argued that the increase of young adults (18 and over) in remand homes is caused by the higher maximum sentences since the 1995 law reform; Kalidien & Van der Heide 2007, p. 199. Note, however, that the courts tend to lower the duration of imposed sentences (see para. 4.1.4). There may very well be other causes, such as the increased age of prosecuted children in general.

⁷⁸ This is no longer prohibited and there is no minimum age for deprivation of liberty; see para. 4.2.

⁷⁹ Evaluation YCIA, p. 76 and additional information from the DJI (upon request).

⁸⁰ In this regard, a child with other than Dutch ethnicity (‘allochtoon’) has been defined as a child who has been born abroad or who has at least one parent born abroad; Kalidien & Van der Heide 2007, p. 200.

⁸¹ Van der Heide & Eggen 2007, tables 6.15, 6.20 and 6.21.

Finally, the average length of stay of children in remand homes fluctuated between 55 days in 1990 and 80 days in 1996, after which it decreased again to 63 days in 2006; this decrease in duration during the past years is arguably related to lower sentencing (see para. 4.1.4). In treatment centres the average length of stay since 1990 has been 375 days. There were some ups (in 1992: 411 days, in 1993: 426 days and in 1996: 424 days), and some downs: 2002 (326) and 2005 (314). It is remarkable that despite this low figure of 2005, actually the lowest in years, was followed by one of the highest figures in years, 423 days, in 2006.⁸²

In this regard it is interesting to note that placement of children in youth institutions is a rather costly intervention; on average a place in an institution costs around €300.- per day.⁸³

4.1.7 Content and Structure of This Chapter

After these introductory notes, this chapter will further concentrate on deprivation of liberty of children in the Netherlands, in particular in the context of juvenile justice. As mentioned in Chapter 1, this chapter's objective is to assess Dutch law (and its implications) regarding children (potentially) deprived of liberty in light of International Human Rights Law and Standards, addressed in Chapter 3.

To this end, paragraph 4.2 will start by providing information on the different forms of deprivation of liberty of children in the Dutch legal system. This information will not be limited to the forms under the juvenile justice system. As this introductory paragraph pointed out, there is (and has been during the past hundred years) a strong connection between the systems of juvenile justice and child protection in the Netherlands. This is particularly visible in the population of youth institutions and justifies some attention to the different forms of deprivation of liberty in different contexts.

Subsequently, this chapter addresses the legal requirements of deprivation of liberty in the context of juvenile justice (para. 4.3) and procedural safeguards (para. 4.4), followed by an analysis of legislation regarding children deprived of liberty in youth institutions, the YCIA (and related regulations) governing these children's legal status (paras. 4.5ff). This chapter basically follows the structure used in Chapter 3 to facilitate comparison.

4.1.8 Some Recent Developments

Before continuing this chapter it is important to mention a few significant recent developments that fell outside the time frame of this study. Some general remarks will be made here and if relevant, occasional reference will be made in the following

⁸² Van der Heide & Eggen 2007, table 6.15.

⁸³ DJI Annual Report 2006, p. 55. Inquiries obtained from the DJI learned that the costs of treatment centres and remand homes separately are not (made) available.

paragraphs and in Chapter 5. Unfortunately, the developments could neither be addressed comprehensively, nor exhaustively.

The first development affects two significant and critical inspection reports that were published in September and October 2007. The first report presented the conclusions of a study jointly conducted by four national inspectorates on the safety of the living, working and individual treatment conditions in the fourteen youth institutions.⁸⁴ Their general conclusion was that the institutions do not carry out their mandate, that is: to safeguard the upbringing and (individual) treatment of children within their care, based on their specific needs. In six out of the fourteen youth institutions the safety of the living, working and treatment conditions was seriously in danger. The other institutions had a low or moderate safety risk.⁸⁵ The inspectorates concluded that the upbringing of the child *de facto* is not the central objective, the individual treatment of children with mental disorders or behavioural problems falls short of the required standard, there are insufficient specialized staff and professionalism, there are serious risks regarding the handling of aggression and violence (*de facto* one focuses more on responses to aggression and violence rather than on prevention), staff show respect for children, but insufficiently justify and clarify their decisions and children have insufficient means to influence daily life and practice in institutions. This first integral study in history regarding the quality of the living, working and treatment conditions of all Dutch youth institutions provides for (worrying) information *inter alia* affecting the enforcement of deprivation of liberty of children in general, including the implementation of legislation and its objectives.

The second report appeared a few weeks after the report of the Inspectorates. It included the findings of the Netherlands Court of Audit ('Algemene Rekenkamer') regarding research on the task of youth institutions to educate children sentenced to youth imprisonment or treatment order, with a view to their reintegration and the reduction of the chances of reoffending.⁸⁶ The Court of Audit concluded that the law (i.e. YCIA) is not enforced adequately in relation to some specific points, in particular regarding the residential or treatment plans (*cf* para. 4.11) and that the law provides insufficient safeguards in this regard for children in remand homes. Furthermore, it concluded that there is insufficient gradual transfer of children from closed institutions to more open institutions and ultimately back into society, and children are insufficiently offered care and assistance after their release (aftercare).

⁸⁴ Youth Care Inspectorate *et al.* 2007 (including Van der Laan *et al.* 2007); *cf* *Parliamentary Documents II* 2007/08, 24 587 and 28 741, no. 232, which includes the response of the State Secretary of Justice. *Cf* Verhagen 2008.

⁸⁵ Note that 'safety' was interpreted rather broadly; it basically referred to the general quality of daily institutional life, treatment programmes and staff.

⁸⁶ Netherlands Court of Audit 2007; *Parliamentary Documents II* 2007/08, 31 21, nos. 1-2. *Cf* *Parliamentary Documents II* 2007/08, 31 21, nos. 3, which includes the response of the State Secretary of Justice.

Moreover, it observed that the recidivism rates are worrisome (60% of the children in youth imprisonment (n=25) committed another offence within six months; 50% of the children with a treatment order (n=4)) and a significant number of the children (50% of the children involved in this study; (n=52)) were simply out of sight (untraceable) after their release, which made it impossible to draw any conclusions regarding their progress. The Court of Audit concludes that these findings are particularly undesirable given the high costs involved, determined at €250,000.- per child, per year (taking into account all the costs, including probation service, police, Public Prosecutions Office, judiciary and youth institutions).⁸⁷

Both reports are currently being debated. The Minister and State Secretary of Justice have announced measures. These should be followed carefully in the future.⁸⁸

The second development that should be mentioned here is the establishment of separate closed youth institutions for children under (civil) child protection law. As highlighted in this paragraph, children under both juvenile criminal law and child protection law used to be placed in the same youth institutions. This historical practice will be terminated in the period 2008-2010. To this end new facilities will be established and some of the youth institutions will be transformed. In this regard the Closed Youth Care Act ('Wetswijziging Gesloten Jeugdzorg') was adopted and entered into force on 1 January 2008.⁸⁹ This Act changed the Youth Care Act and provided the legal foundation for placement of children in closed youth care, as a measure of (civil) child protection law. In addition, the Act introduced a new regulation regarding legal status for these children. Since they (eventually) will no longer be placed in youth institutions, the YCIA will no longer be applicable. This recent development is ongoing and has significant impact on the rights of children deprived of liberty in the Netherlands. As a minimum, it deserves further attention in the future, in particular because first assessments regarding the new legislation point to a lower degree of legal protection of the rights of children in closed youth care (see also para. 4.6.5).⁹⁰

Finally, on 1 February 2008 the Act introducing a new penal measure meant to influence children's behaviour ('Wet Gedragsbeïnvloeding Jeugdigen') entered into

⁸⁷ Cf para. 4.11 for some further remarks regarding recidivism rates.

⁸⁸ Cf Letter of the Council to the State Secretary of Justice of 3 December 2007 (CR 35/1042345/07/KHH/TvV) regarding 'verbetervoorstellen justitiële jeugdinrichtingen' in which the Council makes recommendations to improve the treatment of children in youth institutions. Cf Junger-Tas 2007 regarding the individual treatment of children in Dutch youth institutions in light of the report of the National Court of Audit. She provides recommendations for the reduction of the number of children in youth institutions and for the improvement of the Dutch system of sanctions for children.

⁸⁹ Act of 20 December 2007, *Bulletin of Acts and Decrees* 2007, 578.

⁹⁰ See in this regard, e.g. Bruning & Liefwaard 2006, Liefwaard 2006 and Diepstraten 2008.

force and changed the CCP and CrimCo.⁹¹ It introduced a new penal measure ('gedragsbeïnvloedende maatregel') which is positioned between the community sanction and suspended youth imprisonment on the one hand and the treatment order on the other. It is not meant to deprive a child of his liberty, but it may have impact on the use of deprivation of liberty, in particular the treatment order. In addition, the Act has led to other legislative changes that can impact on deprivation of liberty of children. It includes for example a prohibition of life imprisonment for children sentenced under adult penal law (art. 77b CrimCo) and has changed the rules regarding conditions under which a child's pre-trial detention can be suspended. If relevant, reference will be made to these recent legislative changes.

4.2 DEPRIVATION OF LIBERTY OF CHILDREN IN THE NETHERLANDS – DIFFERENT CONTEXTS AND FORMS

4.2.1 Introduction

Children in the Netherlands can be deprived of their liberty and placed in youth institutions, police stations or elsewhere for different reasons in different contexts. First they can be deprived of their liberty under the juvenile justice system by instigation of the public prosecutor or on the basis of a court order. Second, they can be institutionalized for reasons of child protection, because they have serious behavioural or educational problems. The forms of deprivation of liberty belonging to these two categories are the most common. In addition, a third category could be distinguished: the category of 'other forms of deprivation of liberty', which includes *inter alia* detention of child refugees and children with serious mental health problems.

Paragraph 3.2 showed that the question of whether the placement of a child amounts to deprivation of liberty is not easily answered under International Human Rights Law. In the Netherlands, it is fair to assume that a child's placement in either a police station or a youth institution implies that he is deprived of his fundamental right to liberty and is entitled to the protection of article 37 CRC and the other relevant international human rights provisions; the same is arguable regarding the new institutions of closed youth care. Children placed in police stations, remand homes or treatment centres can be regarded as deprived of their liberty under the guiding definition of rule 11 (b) JDLs. Even though youth institutions can have different levels of security,⁹² no child is permitted to leave at will and a child can

⁹¹ Act of 20 December 2007, *Bulletin of Acts and Decrees* 2007, 575 (entry into force 1 February 2008, *Bulletin of Acts and Decrees* 2008, 24)

⁹² As will be explained in para. 4.8 placement in a youth institution does not necessarily imply that the child is placed in a closed institution; he can also be placed in a (semi-)open institution (art. 14 YCIA). As explained in para. 3.2, rule 11 (b) JDLs does not exclude (semi-) open institutions from

only be placed on the basis of an order by a judicial or other public authority, such as the Public Prosecutions Office (see para. 4.2.2ff).⁹³

In addition, the different categories of deprivation of liberty addressed below share the three general and common characteristics as distinguished in paragraph 3.2. First, a child deprived of his liberty finds himself in a situation that is not transparent to the outside world and which makes him dependent upon the administration and regime of the institution: a dependency which makes the child particularly vulnerable to abusive practices. Second, a child's deprivation of liberty generally results in the child's separation from his parents and his family. Third, based on the International Human Rights Law and Standards addressed in Chapter 3 and while taking into account the first two characteristics, the Dutch government has the (positive) obligation to safeguard the rights of children deprived of their liberty. The government has a particular responsibility for these children who fall under its duty of care. The following analysis of deprivation of liberty of children in the Netherlands should be understood in the light of these points of departure.

4.2.2 Deprivation of Liberty under Juvenile Criminal Law

4.2.2.1 Various Forms⁹⁴

Within the Dutch juvenile justice system there are four forms of depriving children of their liberty. The first form is *arrest*. Each child under suspicion of having committed an offence (art. 27 CCP) can be arrested and taken to the police station. He can be held at the police station 'for investigation' for six hours (art. 61 (1) CCP).⁹⁵

If the criminal investigation requires so, the public prosecutor can order the child's remand in police custody ('inverzekeringstelling'), which can last for three days and be extended by another three days, if strictly necessary.⁹⁶ *Police custody* can be considered the second form of deprivation of liberty of children under juvenile criminal law. The child will generally be kept at the police station, but police custody can be executed anywhere (art. 493 (3) CCP).

The third form of deprivation of liberty is *pre-trial detention*. Upon the demand of the public prosecutor, the examining judge ('rechter-commissaris') can order the accused child to be remanded in custody ('inbewaringstelling') for a maximum of

the definition. On the contrary the JDLs favour open institutions (rule 30 JDLs).

⁹³ It is certainly arguable that placement in a youth institution also amounts to deprivation of liberty under arts. 9 and 10 ICCPR and art. 5 ECHR.

⁹⁴ For more detailed information see para. 4.3.

⁹⁵ The period between midnight and 09.00 am should not be taken into account, which implies that a child can be held at the police station for a maximum of 15 hours; art. 61 (4) CCP.

⁹⁶ Art. 57 (1) jo. 58 (2) CCP.

fourteen days (art. 64 CCP). This custody cannot be prolonged, but the public prosecutor can demand the child's detention in custody ('gevangenhouding'; art. 65 CCP), which *de facto* extends the pre-trial detention. The detention in custody must be ordered by a special chamber of the district court ('raadkamer') and can be ordered for a maximum period of ninety days. Before the end of this ninety-day period the examination in court (i.e. trial) must begin. From that moment, the pre-trial detention can last until sixty days after the court's decision at first instance (art. 66 (2) CCP).

According to article 493 (3) CCP the execution of a child's pre-trial detention can take place wherever the examining judge or the district court orders it. This leaves room for, for example, detention at home. *De facto* pre-trial detention takes place in a youth institution, more specifically in a remand home (art. 9 (2) (a) jo. 16 YCIA).⁹⁷

The fourth form of deprivation of liberty in this category is *deprivation of liberty after conviction*, either through youth imprisonment ('jeugddetentie') or through a treatment order ('plaatsing in een inrichting voor jeugdigen'; PIJ). If a child is convicted of a criminal offence which he committed when he still was a child, he can be sentenced to youth imprisonment (art. 77h jo. 77i CrimCo). The Dutch CrimCo makes a distinction between children who were sixteen or seventeen when they committed the offence and children who were younger. The latter group of children can be sentenced to youth imprisonment for a maximum of twelve months, the former for a maximum of 24 months.⁹⁸ Youth imprisonment is executed in a youth institution, more specifically in a remand home (art. 9 (2) (b) jo. 16 YCIA).

A child can also be committed to a youth institution on the basis of a treatment order (art. 77s CrimCo). This order is not meant as punishment,⁹⁹ but to ensure the treatment considered necessary for the child's healthy and harmonious development and for the protection of society. The treatment order has a fixed duration of two years. Depending on the circumstances of the case it can be prolonged by the court up to a maximum of six years (art. 77t jo. 77s CrimCo). It will in principle be executed in a youth institution, more specifically in a treatment center (art. 77s (5) CrimCo jo. art. 10 (1) (a) jo. 16 YCIA). The order may, however, be executed in another (open) institution. *De facto*, there are long waiting lists for treatment centres.

⁹⁷ Under art. 16a YCIA it can also be executed in a police station, even if the court has ordered the child's detention in a youth institution.

⁹⁸ A related form of youth imprisonment which can be ordered for not fulfilling the obligation to pay a fine or to fulfil community service, both ordered by the court (art. 77l resp. 77n CrimCo).

⁹⁹ *Parliamentary Documents II*, 1991/92, 21 327, no. 6, p. 13.

Children under a treatment order can be placed temporarily in a remand home (art. 9 (2) (d) YCIA).¹⁰⁰

4.2.2.2 Age Limits¹⁰¹

The Dutch juvenile justice system has an MACR of twelve years (art. 486 CCP; art. 77a CrimCo), which is in conformity with the minimum age set by the CRC Committee: twelve years as the internationally acceptable absolute minimum age (GC No. 10, para. 32).¹⁰²

Due to this MACR children younger than twelve cannot be deprived of their liberty in the context of the juvenile justice system. There is however one exception: ‘under-twelves’ suspected of committing offences can be arrested and taken to the police station for interrogation for a maximum period of six hours (art. 487 (1) jo. 61 (1) and (3) CCP).¹⁰³ However, except for this short period of deprivation of liberty, these children may never be remanded in police custody or placed in a youth institution for any reason under juvenile criminal law.¹⁰⁴

The upper age of juvenile justice system is eighteen (art. 488 (2) CCP; art. 77a CrimCo). As a result, each individual who (allegedly) committed a crime when he was under the age of eighteen is entitled to be treated in accordance with the special rules of juvenile justice, which *inter alia* implies that he can only be detained or imprisoned under the juvenile justice system and must be kept separated from adults. Although, the Dutch legal system thus enshrines a separate juvenile justice system (*cf* art. 40 CRC), the CrimCo allows for the possibility to sentence children, sixteen or seventeen at the time of committing the offence, under adult penal law (art. 77b CrimCo). The court can impose an adult sentence if it finds reason to do so in the seriousness of the offence, the personality of the juvenile offender or the circumstances under which the offence was committed. This can in theory lead to a maximum sentence of thirty years of imprisonment or a periodically reviewed, but potentially lifelong treatment order, both executed in adult facilities.

It goes beyond the scope of this study to elaborate on children in adult institutions, but this practice is in conflict with article 37 (c) CRC’s requirement of

¹⁰⁰ Based on art. 11 YCIA the appropriate place should be found within three months; a period which can be prolonged, if found necessary by the competent authority responsible for the children’s placement (see para. 4.3).

¹⁰¹ As mentioned in para. 4.1, the Dutch juvenile justice system is based on the ‘crime date criterion’.

¹⁰² Note, however, that the Dutch MACR is one of the lowest in Europe; the same is true for the minimum age for deprivation of liberty (in the context of juvenile justice); see e.g. the Draft Commentary to the European Rules for Juvenile Offenders Subject to Sanctions or Measures, p. 49. *Cf* Cipriani 2008

¹⁰³ An overnight stay is not mentioned in art. 487 (1) CCP and is therefore prohibited.

¹⁰⁴ Nevertheless, there are children under the age of twelve detained in youth institutions. These children are placed under the system of child protection; see para. 4.1 and below para. 4.2.3.

separation of children from adults. The CRC Committee addressed this (common) practice¹⁰⁵ in its General Comment No. 10 and recommended States Parties that limit the scope of the juvenile justice system to children under the age of sixteen, through exceptions like article 77b CrimCo, ‘to change their laws with a view to achieve a non-discriminatory full implementation of their juvenile justice rules to all persons under the age of 18 years’ (GC No. 10, para. 38; *cf* arts. 1 and 2 CRC).

Strictly, the Dutch government is not violating article 37 (c) CRC, because it made a reservation particularly in light of this possibility to ‘transfer’ a child to the adult penal system (see para. 4.1). Nevertheless, the CRC Committee has specifically recommended the Dutch government to withdraw this reservation and change its practice.¹⁰⁶ The Dutch government has not undertaken any action to give effect to this recommendation,¹⁰⁷ even though recent research revealed that the need for this reservation is rather limited.¹⁰⁸

4.2.3 Child Protection

4.2.3.1 Placement in a Youth Institution or Institution for Closed Youth Care

Under the Dutch Civil Code children can be placed in a youth institution as a measure of child protection. If a child grows up in a manner that seriously threatens his mental or moral interests or his health, and if other remedies to address these threat(s) have failed or are likely to fail, the child and his family can be placed under supervision, ordered by a juvenile judge, often upon the request of the Child Care and Protection Board (art. 1:254 Civil Code).¹⁰⁹ The Youth Care Agency (‘Bureau Jeugdzorg’) is in charge of the execution of a family supervision order (‘ondertoezichtstelling’).

Within the context of family supervision, the child can be placed in a (closed) youth institution, although since 1 January 2008 these children ought to be placed in facilities for closed youth care (see para. 4.1). This placement in alternative care (‘uithuisplaatsing’) must be necessary for the care and upbringing of the child or for

¹⁰⁵ *Cf* e.g. Weijers 2006.

¹⁰⁶ Concluding Observations of the Committee on the Rights of the Child: Netherlands, 26/10/99, CRC/C/15/add. 114, para. 7 and Concluding Observations: The Kingdom of the Netherlands (Netherlands and Aruba), 26/02/04, CRC/C/15/add. 227, para. 10-11.

¹⁰⁷ Although, as mentioned in para. 4.1, recent juvenile justice law reform resulted in the prohibition of life imprisonment for children sentenced under adult penal law (art. 77b (2) CrimCo).

¹⁰⁸ Weijers 2006. Note that Weijers does not call for the abolition of art. 77b CrimCo. He proclaims a better motivated (and more limited) use instead; see Weijers 2006, p. 47-48. *Cf* De Jonge & Van der Linden 2004, p. 253-254 who question the added value of the reservation, particularly since the 1995 law review led to a doubling of the maximum sentences for children. In para. 4.1 reference was made to the recent decrease in adult imprisonments imposed on children.

¹⁰⁹ The Child Care and Protection Board is a governmental organization, under the Minister of Justice, charged with safeguarding the interests of children in the Netherlands.

the examination of the child's physical or mental state and can only be ordered if the child has 'serious developmental or educational problems which hamper his development towards becoming an adult' (art. 29b (3) Youth Care Act). In addition, closed placement must, given these serious problems, be necessary to prevent the child from evading or rejecting the care he needs or that he will be withdrawn from this care by others.¹¹⁰ The juvenile judge must explicitly authorize the Youth Care Agency to place the child in said institutions (art. 1:261 (5) Civil Code).¹¹¹

The placement can be authorized for a period of one year, but juvenile judges tend to limit the authorization to a period of six months or even less.¹¹² The placement can be continuously extended for another period (again for a maximum of one year) upon the specific request of the Youth Care Agency or the Child Care and Protection Board (art. 1:262 Civil Code).

A child under the guardianship of the Youth Care Agency can also be placed in a youth institution or institution for closed youth care. The conditions and (procedural) rules for placement as mentioned before are similarly applicable (art. 1:305 (3) Civil Code).

The authorization is specifically meant for placement in an institution for closed youth care or a youth institution (during the transition phase). The reason for placement may differ. In this regard the judge can provide temporary authorization (art. 29c Youth Care Act), for example in a situation of crisis. These children are to be placed in institutions for closed youth care, but remand homes still are *inter alia* meant for these children (art. 9 (2) (d) YCIA). The same is true if the child's physical or mental state has to be examined. If the child (subsequently) needs treatment, he still can be placed in an appropriate treatment centre (art. 10(1) (b) and (c) YCIA), which should preferably be a (new) institution for closed youth care. However, if the appropriate place is not (yet) available the child may be placed or held temporarily in a remand home (art. 9 (1) (d) YCIA). Like juvenile justice children waiting for treatment, these children often have to wait (too) long for the right place in a treatment centre as well.¹¹³

¹¹⁰ Before 1 January 2008, the child had to 'suffer serious behavioural problems' ('ernstige gedragsproblemen'); art. 1:261 (5) (old) Civil Code.

¹¹¹ The request for placement in a youth institution can also be made together with an initial request for family supervision. Note that family supervision is no longer required if parents consent; art. 29b (2) (c) Youth Care Act.

¹¹² YCIA Evaluation 2004, p. 147; De Savornin Lohman *et al.* 2000, p. 81-83.

¹¹³ In light of this it is remarkable that the YCIA does not provide that the placement of a 'child protection child' must be realized within three months after the initial placement in the remand home. Art. 11a YCIA may enter into force on 1 January 2010, which provides for a legal basis to claim placement.

4.2.3.2 Age Limits

As mentioned before deprivation of liberty under the CrimCo is limited to children above the age of twelve, under which age the child cannot be held criminally responsible. Placement in the context of civil law (child protection) does not have an age limit. The Dutch Civil Code does not provide for a minimum age for placement of children in a youth institution.

In 1990, the then Minister of Justice found it inappropriate to place children younger than twelve in closed institutions and he issued the Judicial Child Care Institutions (Regulations) Decree, providing in articles 4 and 5 that children under the age of twelve cannot be placed in these institutions. However, this Decree was withdrawn, when the YCIA entered into force (2001). Given the absence of a general minimum age of deprivation of liberty of children in the Netherlands, there no longer is a legal barrier to depriving these young children of their liberty by placing them in a youth institution or facility for closed youth care. This is in conflict with rule 11a JDLs, calling for a minimum age of deprivation of liberty.¹¹⁴

Finally, the upper age limit of the child protection system is eighteen years, the age of majority (art. 1:233 Civil Code; *cf* art. 1 CRC). The placement in a youth institution used to expire *ipso jure* when the child reached that age, but under the revised Youth Care Act the placement of these children can be prolonged after their eighteenth birthday (art. 29a Youth Care Act).¹¹⁵

4.2.4 Deprivation of Liberty in Other Contexts

There are three other forms of deprivation of liberty that potentially result in placement in a youth institution (i.e. a remand home). The first one is detention of child refugees or asylum seeking children, who are waiting for expulsion ('vreemdelingenbewaring'). This detention can take place in youth institutions if it concerns individuals under the age of eighteen (i.e. children or those under the age of eighteen who are declared of age under art. 1:253ha Civil Code) and if the detention is required for the interests of public order or national safety (art. 59 Aliens Act 2000; art. 9 (2) (c) YCIA).

The second ground is based on the Psychiatric Hospitals (Compulsory Admissions) Act ('Wet Bijzonder opnemingen psychiatrische ziekenhuizen'). On

¹¹⁴ As mentioned in para. 4.1 there have been 'under-twelves' in youth institutions since 1999, although their numbers were relatively small. In 2005 a special facility called 'Horizon' was established – a facility for youth care and education specifically for children between 7 and 13 years, who need treatment in a closed/semi-open facility under civil child protection law. *Cf* Court of Appeal of Arnhem, 15 February 2005, *JPF* 2005/62 (annotated by V. Smits).

¹¹⁵ To this end these children are considered minors under the (art. 1:233 Civil Code), which raises numerous questions, one of which affects the compatibility with art. 5 (1) ECHR. It goes beyond the scope of this study to elaborate on this.

the basis of a court order a child can be placed in a psychiatric hospital if he is a danger to himself or to others (arts. 2 and 32 Psychiatric Hospitals (Compulsory Admissions) Act). If a child is concerned and if there is no (appropriate) place available in a psychiatric hospital or the appropriate place must still be determined, the order can be executed in a youth institution (art. 9 (2) (d) YCIA).

The third and final ground for deprivation of liberty (and placement in a youth institution) in this category is ‘commitment for failure to comply with a judicial order’ (‘gijzeling’). If a child, for example, does not want to testify before a court, he can be committed to a youth institution (art. 9 (2) (f) YCIA).

These placements form what could be considered the third category of ‘other grounds of deprivation of liberty’. Remand homes are designated for their enforcement (art. 9 (2) jo. 16 YCIA). The latter two forms rarely occur; detention of child refugees or asylum seeking children comprise slightly more (1% of the population of remand homes in 2005¹¹⁶).

4.2.5 Conclusion

The two main categories of deprivation of liberty of children in the Netherlands are deprivation of liberty in the context of juvenile justice and in the context of civil child protection. Both categories have different legal backgrounds and serve different (primary) objectives, but they are nevertheless strongly connected and interrelated. They share a historical development (see para. 4.1) and result in placement in the same youth institutions, although this is subject to change (see also para. 4.6). In addition, both categories share the fact that all forms of arrest, detention, imprisonment or other placement constitute deprivation of liberty under International Human Rights Law and Standards, in particular in article 37 CRC and the JDLs.

This justifies the conclusion that the Dutch government has the (positive) obligation to live up to the relevant provisions of International Human Rights Law and Standards, enshrining legal requirements regarding the imposition of deprivation of liberty and regarding the quality of treatment of children who are deprived of their liberty. Henceforth, this chapter primarily focuses on deprivation of liberty as part of the juvenile justice system. Still, many details addressed in the following paragraphs are equally relevant for the other categories, particularly those resulting in placement in youth institutions.

¹¹⁶ Van der Heide & Eggen 2007, table 6.20.

4.3 LEGAL REQUIREMENTS CONCERNING DEPRIVATION OF LIBERTY OF CHILDREN

4.3.1 Introduction

‘Everyone in the Netherlands is free and competent to enjoy civil rights’, according to the first article of the Dutch Civil Code. Each individual, man or women, adult or child, is entitled to civil rights under the Dutch Constitution and international human rights treaties ratified by the Netherlands (art. 93 of the Constitution). Nevertheless, as the former paragraph has clarified, children in the Netherlands can be deprived of their liberty, implying a far-reaching limitation of their right to liberty (of the person).

Article 37 (b) CRC provides that ‘[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily’ (see para. 3.4). This represents a point of departure that has been accepted widely in International Human Rights Law and can be found in every international and regional human rights treaty. The prohibition of unlawful or arbitrary deprivation of liberty affects the legal foundation, the procedure and enforcement. It serves as an (binding) instruction to both legislator and the implementing or enforcing authorities. In addition, article 37 (b) CRC provides two additional specific legal requirements for arrest, detention or imprisonment of children: the principle of last resort and the requirement of the shortest appropriate period of time. Both elements are two significant concepts of International Human Rights Law for deprivation of liberty of children, which give content to the requirements of lawful and non-arbitrary deprivation of liberty (see for more details para. 3.4).

This paragraph addresses the legal requirements in Dutch Law concerning deprivation of liberty of children within the juvenile justice system. After a brief general analysis of the prohibition of unlawful or arbitrary deprivation of liberty in Dutch (criminal) law, particular attention will be given to the juvenile justice forms of deprivation of liberty and their potential duration (para. 4.3.2). Subsequently, this paragraph will analyze the requirements of last resort and shortest appropriate period of time and address the question to what extent Dutch law is in compliance with International Human Rights Law and Standards in this regard (4.3.3).¹¹⁷

¹¹⁷ The relevant legal safeguards, such as the right to challenge the legality of deprivation of liberty will be addressed separately in para. 4.4; *cf* para. 3.4.5.

4.3.2 Prohibition of Unlawful or Arbitrary Deprivation of Liberty

4.3.2.1 Prohibition of Unlawful Deprivation of Liberty

Unlawful deprivation of liberty is prohibited under article 15 (1) of the Dutch Constitution, which provides that no one may be deprived of his liberty in any way other than as laid down by law or pursuant to an act of parliament. As can be derived from paragraph 4.2 children in the Dutch juvenile justice system can be arrested, placed (and held) in police custody, detained, imprisoned and ordered to be treated in a closed institution. All these forms of deprivation of liberty are based on the CCP or CrimCo, both statutory laws. Consequently, they are lawful as such.¹¹⁸

In addition, Dutch juvenile criminal (procedural) law has its foundation in general criminal law, which implies that the general criminal law principles are also applicable to the juvenile justice system. Particularly, significant in this regard is the principle of legality embodied in art. 1 (1) CrimCo (*nullem crimen sine lege*) and art. 1 CCP (*nullum iudicium sine lege*), which generally affects the lawfulness of prosecution (and thus arrest and detention as part of it), as well as the lawfulness of sanctions (*nulla poena sine lege*).¹¹⁹

There is no difference in the legal basis regarding arrest, police custody and pre-trial detention for adults and children. The rules regarding enforcement are somewhat different, so are some procedural aspects. Regarding disposition the CrimCo embodies a specific set of juvenile justice sanctions, including youth imprisonment and a specific treatment order.

A. Arrest and Police Custody

As mentioned in paragraph 4.2 each child under suspicion of committing an offence (art. 27 CCP) can be arrested and taken to the police station for interrogation. In the event that a child is caught in the act he can in principle be arrested by anyone who witnesses the offence (art. 53 (1) CCP).¹²⁰ An arrest of a person not caught in the act can in general only take place if ordered by the public prosecutor or by the public prosecutor himself (art. 54 (1) CCP).¹²¹ The (assistant) public prosecutor is entitled to bring the child suspect to the place where he can be interrogated, the police

¹¹⁸ Cf art. 37 (b) CRC and art. 5 (1) (a), (c) and (d) ECHR.

¹¹⁹ Corstens 2005, p. 15ff. See also art. 16 Dutch Constitution and art. 40 (2) (a) CRC, art. 7 ECHR and art. 15 ICCPR.

¹²⁰ The child must be brought before the (assistant) public prosecutor as soon as possible.

¹²¹ In the case of urgency the assistant public prosecutor is entitled to exercise these competences (art. 54 (2) CCP), who must immediately inform the public prosecutor orally, or even investigating officers, who must bring the child suspect before the (assistant) public prosecutor immediately (art. 54 (3) CCP).

station. The child can be held temporarily (six to fifteen hours)¹²² at the police station if the interests of the criminal investigation requires so ('ophouden voor onderzoek'; art. 61 (1) CCP).¹²³

If required by the criminal investigation ('in het belang van het onderzoek'), the public prosecutor can order the child's remand in police custody (art. 57 (1) jo. 58 (2) CCP). Remand in police custody can only be ordered if the child is under the suspicion of committing a serious crime which legitimizes pre-trial detention (art. 58 (1) CCP; see below). The remand order can endure for three days. This term can be used for (preliminary) criminal investigations (e.g. interrogations) and to assess whether there are grounds to demand the child's pre-trial detention.¹²⁴ It can be extended if strictly necessary ('dringend noodzakelijk') in the interests of the criminal investigation: an assessment which should be made when the end of the first term is near (i.e. not at the beginning of this term; art. 57 (1) jo. 58 (2) CCP).¹²⁵

Thus, the lawful ground for arrest is the suspicion of the child. Remand in police custody is only allowed for serious crimes, which legitimizes pre-trial detention and only if required by the criminal investigation. Extension of remand in police custody can only be ordered if strictly necessary. The lawfulness of the arrest and subsequent police custody is subject to review in this phase before the examining judge (who must be a juvenile judge in juvenile justice cases; art. 492 CCP). Each arrested child must, if not released earlier, be brought before the judge within three days and 15 hours after the arrest (art. 59a CCP). If he rules the remand in police custody unlawful, he must order the child's release immediately (see also para. 4.4).¹²⁶

B. Pre-trial Detention

While remand in police custody can be ordered by the public prosecutor, Dutch law provides that pre-trial detention must be ordered by a judge or court. The cases and grounds for pre-trial detention (divided into remand in custody and detention in custody; see para. 4.2) are exhaustively prescribed by the CCP and they apply equally to both children and adults (arts. 67 and 67a CCP). Pre-trial detention can only be ordered if the child is accused of having committed a serious crime. 'Serious' in this regard means a crime that, if committed by an adult, can lead to a maximum imprisonment of four years or more. Furthermore, the examining judge or

¹²² The child can be kept at the police station for 6 hours. The period between midnight and 09.00 am should not be taken into account, which implies that a child can be held at the police station for a maximum of 15 hours; art. 61 (4) CCP.

¹²³ An additional ground can be found in the service of announcements regarding the criminal case, such as the summons (art. 61 (3) CCP). If a child cannot be placed in remand in police custody (see below), he can still be held at the police station for another 6 hours, if required for the determination of his identity (art. 61 (2) CCP).

¹²⁴ Uit Beijerse 2005, p. 968-969. Again the service of announcements serves as an additional ground (art. 57 (1) CCP).

¹²⁵ Corstens 2005, p. 374.

¹²⁶ For a critical analysis of these procedural rules (in an historical context) see Uit Beijerse 2005.

the special chamber of the court can only order pre-trial detention if there are ‘serious objections’ (‘ernstige bezwaren’) against the accused child (art. 67 (4) CCP). ‘Serious objections’ implies a higher threshold than the mere suspicion of having committed a crime.¹²⁷ In addition, pre-trial detention can only be ordered if there is a serious risk that the accused child will flee or if there are serious issues of public safety that demand the child’s detention (art. 67a (1) CCP). The latter ground has been worked out by the legislator. A serious issue can be assumed provided that: (1) the child is accused of having committed a serious crime (i.e. a crime that can lead to maximum custodial sentence of twelve years or more), (2) there is a serious risk that the child will commit a(nother) serious crime (i.e. a crime that can lead to maximum custodial sentence of six years or more or a crime that puts public safety or the safety of persons in danger), (3) the child has been convicted earlier for certain violent crimes and there is a serious risk that he will reoffend, *or* (4) the detention is reasonably necessary in light of the chance that the accused child will interfere negatively with the criminal investigation (danger of collusion; interfering with witnesses or tampering with evidence; art. 67a (2) CCP). Article 67a (3) CCP explicitly provides that detention must not be ordered if there is a serious chance that the child will eventually not be sentenced to imprisonment at all or that he will not be imprisoned for a period longer than his detention.

In conclusion, the Dutch legislator has limited pre-trial detention to an exhaustive list of cases and grounds embodied in the CCP, which provides it with a statutory legal basis. The detention must be ordered by either the examining judge, who must be a juvenile judge (art. 492 CCP) or a special chamber of the court.

Like police custody, pre-trial detention is limited in time by the CCP. As mentioned in paragraph 4.2, remand in custody has a maximum duration of fourteen days (art. 64 CCP). Subsequently, the public prosecutor can demand the child’s detention in custody, which can be ordered by a special chamber of the court for a maximum period of ninety days (art. 66 (1) CCP). Before the end of this period of three months the court hearing or the examination in court must begin, which implies that the child will be brought before a court again. If so, the pre-trial detention can endure until sixty days after the court’s decision in the first instance (art. 66 (2) CCP). This makes the duration of pre-trial detention to a large extent dependent on the court’s procedure.

The maximum time limits for children are basically the same as those for adults, but the CCP does provide for one exception to the maximum duration of detention in custody of ninety days. If a child has not been heard by the court, it can order the detention for a maximum period of *thirty* days (art. 493 (4) CCP). If the child has

¹²⁷ Corstens 2005, p. 386.

been heard, the court can order ninety days of detention at once (without interim legal review; see para. 4.4).¹²⁸

C. Youth Imprisonment

If the juvenile judge or court finds the child guilty on the charged serious offences ('misdrijven') – minor offences ('overtredingen') are excluded – it can sentence the child to youth imprisonment. It has, as one of the two dispositions leading to deprivation of liberty, its legal foundation in article 77h jo. 77i CrimCo. Youth imprisonment is one of the principle sanctions in the juvenile justice system. The maximum duration is set by the CrimCo as well. As mentioned in paragraph 4.2, it is related to the age of the child when he committed the offence: twelve months for children younger than sixteen or 24 months for children of sixteen or seventeen years of age.¹²⁹ The latter group can be sentenced under adult penal law if the court finds reason to do so in the seriousness of the offence, the personality of the child or the circumstances under which the crime has been committed (art. 77b CrimCo). Under adult penal law the child can be deprived of his liberty in an adult facility. He can for example be sentenced to a maximum imprisonment of thirty years or to an adult treatment order ('terbeschikkingstelling').¹³⁰

Furthermore, youth imprisonment can be imposed if the child has not paid a fine, if imposed as a principle sentence by court, or the child has not successfully completed community service or a training programme (arts. 77l and 77n CrimCo). The maximum duration of this 'alternative youth imprisonment' is dependent on the size of the fine and duration of the (uncompleted) community service order.¹³¹

D. Treatment Order

The second disposition resulting in deprivation of liberty is the treatment order. This penal order is based on article 77h (4) jo. 77s CrimCo. As mentioned in paragraph 4.2 it is not meant to be a punishment. Instead, it is particularly designed to order the child's individual treatment if required by the child's further upbringing and development, and security of society.¹³²

¹²⁸ The public prosecutor and the examining judge can terminate the remand in custody; art. 64 (2) CCP. The court has a similar competence; termination of detention in custody can be terminated by the court upon the recommendation of the examining judge or demand of the public prosecutor; art. 69 CCP. The child can request the court to terminate his pre-trial detention. Moreover, if the public prosecutor decides to terminate the prosecution, the detention ends *ipso jure*; art. 70 (1) CCP.

¹²⁹ The duration is less the time a child has spent in pre-trial detention (art. 77i jo. 27 CrimCo).

¹³⁰ He can also be placed in an institution for persistent offenders ('maatregel tot plaatsing in een inrichting voor stelselmatige daders'; art. 38m CrimCo). Formerly, the child could theoretically be sentenced to life imprisonment, but as mentioned in para. 4.1 this is no longer permitted (since 1 February 2008).

¹³¹ Alternative imprisonment for a community service order can have a maximum duration of 4 months (120 days): 1 day for each 2 hours of community service (up to a maximum of 240 hours).

¹³² De Jonge & Van der Linden 2004, p. 103; Bartels 2003, p. 77.

The child's treatment can only be ordered under three cumulative conditions (art. 77s (1) CrimCo). The child must have committed a serious crime for which pre-trial detention is allowed (art. 67 CCP; see above). Subsequently, the order must be demanded for reasons of public safety in general or for the safety of others in particular – the 'danger criterion' ('gevaarscriterium'). Finally, the treatment order must also serve the interests of the child's best development, the 'assistance criterion' ('hulpverleningscriterium'). The court can only order the child's treatment after it has been advised by at least two behavioural experts. The appropriateness of the order should be determined on the basis of a child's assessment of at least two behavioural experts (e.g. a psychologist and a social worker) – one of the requirements for imposition (art. 77s (2) CrimCo).¹³³

The treatment order has an initial duration of two years – a term set by law. There is no room for deviation.¹³⁴ This term starts as soon as the court's judgment becomes final.¹³⁵ Prolongation of the treatment order is only permitted if the child has been convicted of a violent crime or sex offence; it must be demanded by the public prosecutor (art. 77t jo. 77s CrimCo). In addition, continuation of the treatment order must (still) be required in light of the danger and assistance criteria. The prolongation can be ordered for a maximum period of two years. The CrimCo does not prescribe a minimum period of prolongation. The treatment order can be prolonged for another two years and reach its maximum duration of six years, if the child suffered from limited development or mental disorder when he committed the offence (art. 77t (2) jo. 77s (3) CrimCo). This must have been established during the initial procedure.

4.3.2.2 Prohibition of Arbitrary Deprivation of Liberty

Although the forms of deprivation of liberty in the Dutch juvenile justice system are firmly based on statutory law, neither the Dutch Constitution, nor the CCP and CrimCo contain an explicit prohibition of *arbitrary* deprivation of liberty.

¹³³ One of these experts can be a psychiatrist, but this is compulsory if the child suffered from 'limited development and mental disorder' at the time of committing the offence; see De Jonge & Van der Linden 2004, p. 106-107.

¹³⁴ The court can order that (part of) the treatment order be suspended under conditions; this rules out prolongation (art. 77x jo. 77t (3) CrimCo). According to Bartels an enforced suspended treatment order cannot be prolonged either; Bartels 2003, p. 83. De Jonge & Van der Linden argue that the courts are contradictory, but that the Court of Appeal of Arnhem, competent to hear appeals regarding the treatment order, has ruled that a enforced suspended treatment order can be prolonged; De Jonge & Van der Linden 2004, p. 108-109.

¹³⁵ Article 77g (2) CrimCo implicitly allows (i.e. by not excluding it) the child to be sentenced to a combination of youth imprisonment and a treatment order. In that case the term of the treatment order starts after the completion of the youth imprisonment; art. 77s (7) CrimCo. Cf Bartels 2003, p. 81. The legislator initially was not in favour of such a combination, but agreed later; De Jonge & Van der Linden 2004, p. 118. See for a critical analysis Volf 2001; cf Vlaardingbroek 2001. Since 1 February 2008 the CrimCo allows for each desirable combination of youth sanctions.

The provisions of the CCP and CrimCo as such cannot be regarded as arbitrary, but their enforcement may very well be, particularly where the law leaves much discretion, which makes the absence of prohibition in the Dutch legal system more apparent. As mentioned in paragraph 3.4, the risk of arbitrary deprivation of liberty is dependent on the discretionary power of the different authorities and legal checks and balances. In the Netherlands, arrest and police custody primarily is a matter for the police and the Public Prosecutions Office; these authorities have been given a large discretion. Pre-trial detention must be ordered initially by the examining judge and subsequently by a special chamber of the district court. Disposition leading to a child's deprivation of liberty may only be imposed by the judiciary (art. 113 (3) of the Constitution).

As pointed out in paragraph 3.4, International Human Rights Law does not contain a hard, legally binding rule that pre-trial detention (or police custody) must be ordered by a court, judge or other competent judicial body. Therefore the police and Public Prosecutions Office can have a certain discretion. In addition, each individual arrested or detained should have the right to challenge (the legality of) his deprivation of liberty before a court or other competent, independent or impartial authority (art. 37 (d) CRC). In this regard it is worth mentioning that the CCP provides that each child (or adult) must be brought before the examining judge after three days and fifteen hours after his arrest (art. 59a CCP), although the CRC Committee has recommended that a child should be brought before an authority competent to examine the legality of the deprivation of liberty within 24 hours after the arrest (GC No. 10, para. 83; see further para. 4.4).

The enforcement of pre-trial detention, youth imprisonment and treatment order takes place under the responsibility of the Public Prosecutions Office. If a child is placed in a youth institution, the National Agency for Correctional Institutions (of the Ministry of Justice), more specifically the selection official, is responsible for the selection of the right place and the actual placement (art. 16 YCIA). If the court sentences a child to youth imprisonment or a treatment order, it has the competence to add its advice regarding the place of execution (art. 77v (1) CrimCo). The YCIA, however, authorizes the selection official to ignore this advice and determine the appropriate placement for the child based on his own (policy) criteria. The court's advice is not legally binding, but it is quite remarkable for a civil servant belonging to the executive power to be able to set aside an advice of a court of law (see further para. 4.7).

In addition, another competence of the selection official deserves particular attention. Based on article 16a YCIA, the selection official can order that a child, who should be placed in a youth institution, remain at the police station for a maximum of another three or ten days, depending on the child's age. A child of sixteen or older can be held at the police station for another ten days, if there is no place available in a youth institution; a child between twelve and sixteen can be held at the police station for three days maximum, but only if his transportation cannot be

arranged sooner.¹³⁶ Although based on statutory law, it is a far-reaching competence of a civil servant, which can be regarded as a weak link in the prevention of arbitrary deprivation of liberty of children.¹³⁷ The police station can hardly be regarded as an appropriate place for children and it is highly questionable whether a child will be separated from adults (art. 37 (c) CRC). In addition, a child cannot appeal against this particular decision of the selection official.¹³⁸

Article 493 (3) CCP does not provide for much further guidance in this regard, since it states in general terms that police custody and pre-trial detention can be executed anywhere. It is, however, clear that this provision is not meant to keep a child in a police station for reasons of capacity shortage or lack of transportation. On the contrary, article 493 (3) CCP contains the possibility of opting for other places (e.g. the child's home) that are regarded more appropriate than a detention centre or police station.

4.3.3 Deprivation of Liberty as a Measure of Last Resort and for the Shortest Appropriate Period of Time

4.3.3.1 Introduction – Diversion and Alternatives for Deprivation of Liberty

Two specific CRC elements of the prohibition of unlawful and arbitrary deprivation of liberty are the requirements of last resort and the shortest appropriate period of time (see para. 3.4). The implementation of these requirements is a matter of both legislation and enforcement. The domestic legislator should adopt legislation which fosters the use of deprivation of liberty as a measure of last resort, for example by providing for lawful alternatives to arrest, detention or imprisonment or less restrictive forms of deprivation of liberty (e.g. home confinement). In addition, it could set specific time limits for (periodic) judicial review and draw up a specific set of juvenile sanctions, which differ from adult sanctions regarding duration (i.e. shorter) and execution (i.e. in appropriate (youth) facilities). In addition, the implementation of last resort requires the development and use of sufficient, adequate alternatives (art. 40 (4) CRC). Deprivation of liberty for the shortest appropriate period of time also is a matter of enforcement in the sense that it requires tailor-made decisions in which both the interests of the child and other interests of the justice system are balanced. This again could be fostered by the

¹³⁶ This assumes that the child has already stayed at the police station (e.g. in police custody). Art. 16a YICA can also be applicable when a child ends up in a police cell during the execution of his youth imprisonment or treatment order, e.g. after an escape. It cannot be used regarding children under the age of twelve.

¹³⁷ See para. 4.3.3.2 for some data regarding the application of this provision.

¹³⁸ Art. 18 YCIA does not refer to art. 16a YICA. Cf. Uit Beijerse 2005a and 2005b, and Volf 2005. See also paras. 4.6 and 4.7.

legislator by providing the necessary legal framework including requirements and safeguards.

Finally, a restrictive use of deprivation of liberty of children – the main message of International Human Rights Law – is certainly not served by extensive use of the juvenile justice system. Therefore, diversion could be seen as an important key to reducing the use of deprivation of liberty as part of the juvenile justice system (art. 40 (3) CRC).

As mentioned in paragraph 4.1 diversion has been largely embedded in the Dutch juvenile justice system; two-thirds of all cases registered at the Public Prosecutions Office are settled without resorting to judicial proceedings. The office can offer children in conflict with the law a conditional dismissal (a transaction), which can divert them from further prosecution before a court (art. 77f jo. 74 CrimCo). In addition, the police settles many cases itself, through the HALT-programme that has been developing since 1981 and which was given a legal basis in 1995 (art. 77e CrimCo).¹³⁹

During the pre-trial phase and regarding disposition in the juvenile justice system, the Public Prosecutor Office has adopted the policy ‘community service order, unless...’, which indicates that it favours resorting to community service and/or a treatment order rather than to a disposition that can lead to deprivation of liberty (see para. 4.1). The impact of this policy is visible in the figures presented in paragraph 4.1, which show that the courts increasingly order community service; recently a slight decrease is visible regarding the use of youth imprisonment and the treatment order. One should however note that if the child does not pay the fine or does not complete the community service or training programme he may end up in alternative youth imprisonment.¹⁴⁰

Besides a community service order as a disposition, the CrimCo provides fines as another principle sanction for children (€3,700.- is the maximum permissible) that may positively affect the use of youth imprisonment as a measure of last resort, although it is little used in practice (see para. 4.1).¹⁴¹

¹³⁹ Although HALT arguably has little impact on the use of police custody and pre-trial detention, it represents the Dutch system of diversion (*cf* art. 40 (3) CRC).

¹⁴⁰ The court is obliged to determine the length of the alternative youth imprisonment (art. 77n CrimCo), which if applicable can be ordered by the public prosecutor.

¹⁴¹ The court can order alternative imprisonment in the event that the child does not or cannot pay when imposing a fine, but is not compelled to do so; art. 77l CrimCo. Furthermore, if the child does not or cannot pay the fine, the court can order an alternative community service order instead. The legislator has deliberately opened this opportunity and build in another court session, rather than providing the public prosecutor with the competence to convert the fine into another sanction (e.g. alternative youth imprisonment). Finally, the court can also pardon the child if it finds reason in the non-seriousness of the offence, the personality of the child offender or the circumstances of the case; art. 9a CrimCo.

Paragraph 4.1 also showed that the number of children in youth institutions has been increasing significantly during the past decades. This raises a number of questions, one of which is to what extent deprivation of liberty is used as a measure of last resort. The figures also revealed that this increase to a large extent has been caused by an increase in the number of children placed in remand homes under child protection law, due to improved procedures and specific arrangements regarding placement of children in crisis and lack of alternatives caused by severe financial cutbacks. The child protection system is to some extent also regarded as an alternative to disposition under the juvenile justice system.¹⁴² This does however not necessarily mean that the child will not be deprived of his liberty. Children diverted to the child protection system, may very well be placed in a youth institution (or in one of the new institutions for closed youth care).

As highlighted in paragraph 4.1, the average stay in a youth institution is between seventy and eighty days; in treatment centres the average stay over the past fifteen years has been around 375 days; in 2006, however, the average duration of 2006 was one of the highest in years (423 days).

4.3.3.2 Arrest and Police Custody

The initial arrest is primarily a matter of police work and law enforcement, as pointed out in paragraph 3.4. Also in the Netherlands, the police have a large discretion and therefore play a significant role in the implementation of the principle of last resort with regard to arrest. The grounds for and duration of arrest, initial police interrogations, and subsequent remand in police custody are prescribed by the CCP. The public prosecutor has the overall responsibility and competence, which makes him primarily responsible for the implementation of the principle of last resort. Given the rather open norms of the CCP, he should strictly assess whether the child's police custody is required by the investigation or whether it can be avoided. Regarding the latter element, he should take into account that the suspect is a child; the CCP does in principle not distinguish between children and adults. One specific element, however, has been laid down in article 493 (3) CCP, which provides that the enforcement of police custody can take place anywhere, which for example includes the child's home. Although this may require serious adjustments regarding police investigations, in particular regarding interrogations, this provision has significant potential in light of using less far-reaching forms of police custody, such as home confinement, and could contribute to the principle of last resort (i.e. by using a less infringing method). In addition, it can serve as a basis to find the most appropriate place for the child's custody; a police station can hardly be regarded as appropriate for a child. Despite this great potential, it is not used in practice.¹⁴³

¹⁴² See, e.g. Bartels & Van Dijken 2005.

¹⁴³ Doek & Vlaardingerbroek 2006, p. 464.

The CCP sets fixed time limits regarding arrest, police interrogations and remand in police custody. These are maximum limits. The appropriateness of the use of deprivation of liberty in this phase of the justice process is primarily determined by the interests of the criminal investigation. The CCP forces release of the child (like any adult) as soon as his police custody is no longer required for the investigation (art. 58 (3) CCP). In this regard, the public prosecutor should make interim assessments. This is particularly significant since the CCP does not make any specific reference to children in this regard. In light of the recommendations of the CRC committee, sharper time limits for children (e.g. a maximum of 24 hours) are recommended. Practical counter-arguments could be rejected by proclaiming the use of home confinement for example (see above). Above all, given the broad discretion for both the police and public prosecutor, the judicial review built in after three days and fifteen hours is of particular significance (art. 59a CCP; although this term should arguably be shorter for children; see para. 4.4).

Figures with regard to a child's stay in police custody are not easy to find; they are not widely published in public documents such as annual reports. Figures provided by the National Office of the Public Prosecutions Office show that 6,759 children were remanded in police custody in 2006 (6,192 boys and 567 girls); 4,196 children were subsequently detained (3,907 boys; 289 girls). Compared to 2002 (5,627 in police custody; 3,431 pre-trial detention) the number of children in police custody and pre-trial detention has increased, although the numbers were higher in 2004 (6,921 in police custody; 4,371 in pre-trial detention) and 2005 (6,988 in police custody; 4,554 in pre-trial detention).¹⁴⁴ The increase between 2002 and 2006 could be explained by the increase in the number of registered cases at the Public Prosecutors Office (see para. 4.1). The decrease in 2006 seems to point at a small reduction of the use of police custody and pre-trial detention, since the number of registered cases in 2006 was higher than in 2004 and 2005.

Inquiries at the National Agency for Correctional Institutions resulted in information about the average stay of children in police custody and subsequent pre-trial detention executed at the police station (under article 16a YCIA).¹⁴⁵ In 2007 the average stay of children in police custody was 3.7 days. Of the total number of children who were remanded in police custody in 2007 (3,567 children), 2,325 were either released afterwards or transferred immediately to a youth institution (under a

¹⁴⁴ National Office of the Public Prosecutions Office ('Parket-Generaal'), 'MEGAbestand OM 2002-2006', 5 April 2007, p. 2.

¹⁴⁵ Note that there is a significant difference between the number of children registered in police custody and pre-trial detention by the National Agency for Correctional Institutions regarding 2007 and by the National Office of the Public Prosecutions Service regarding the years 2002-2006. The differences come down to differences in the method of registration, which makes these figures inappropriate for comparison.

pre-trial detention order by the examining judge). 1,242 children (i.e. one-third of the children in police custody) had to stay for another day or more at the police station. The average continued stay at a police station in 2007 was 4.5 days. 78 children had to stay for another ten days (see table 4.2).

Table 4.2: Pre-trial Detention of Children at Police Stations in 2007

Duration of pre-trial detention at police station in days	Number of children
0*	2,325
1	230
2	114
3	221
4	118
5	136
6	124
7	94
8	72
9	54
10	78
13**	1
Total number	3,567

Source: DJI, May 2008 (upon request).

* This indicates that these children were either released or transferred immediately to a youth institution.

** This could indicate a violation of art. 16a YCIA.

4.3.3.3 Pre-trial Detention

A. Pre-trial Detention and the Requirement of Last Resort

The first initiative for pre-trial detention is taken by the public prosecutor who should, if he finds reason to, demand the child's remand in custody. As mentioned above, the Dutch legislator has limited pre-trial detention to an exhaustive list of cases and grounds embodied in the (statutory) CCP. By doing so the legislator respected the requirement of lawfulness and created legislation that can positively affect the use of pre-trial detention as a measure of last resort. The criterion 'serious objections' (art. 67 (3) CCP) is an open norm, which leaves room for interpretations (in individual cases) that may result in lowering the threshold for pre-trial detention. However, remand in custody and subsequent detention in custody must be ordered by the examining judge (who must be a juvenile judge) and the special chamber of the court, respectively. In addition, the norm 'serious objections' raises a higher threshold than the mere suspicion of having committed a crime regarding remand in police custody. Furthermore, pre-trial detention regarding minor offences is explicitly excluded. In this regard, one must however take into account the fact that the number of crimes within the scope of this provision has increased, which can

increase the use of pre-trial detention (or lead to the use of pre-trial detention in an individual case, which would otherwise not have occurred). For example common assault is considered a case that justifies pre-trial detention, which it was not before 1 October 2004.¹⁴⁶

In light of the requirement of last resort it is important to reiterate that the CCP does not distinguish between adults and children in this regard. The child should not be entitled to less legal protection than adults, but one could argue that a child's pre-trial detention must be considered even more carefully and more reticently. The CCP does not provide any guidance in this regard.

B. Mandatory Consideration of Suspension of Pre-trial Detention

The CCP contains one key provision that represents the principle of last resort and which applies exclusively to children: article 493 (1) CCP. If the court (or examining judge) orders the child's pre-trial detention, article 493 (1) obliges it to consider its immediate suspension or suspension after a certain period of time (the latter is significant for detention for the shortest appropriate period of time). This mandatory consideration is a far-reaching instruction of the legislator to the judiciary and implies that the court (or examining judge) should explicitly explain why it does not suspend the child's pre-trial detention.

The court can suspend the child's detention under general or specific conditions. The general conditions are that the child shall not withdraw himself from the execution of the detention's order if the suspension is terminated,¹⁴⁷ and that the child if he happens to be convicted and sentenced to imprisonment for another crime, shall not withdraw himself from that judgment's execution (art. 80 (2) and (3) CCP).¹⁴⁸

The court (or examining judge) is rather free in determining specific conditions of suspension. *De facto* suspension is an important instrument to positively influence the child's behaviour, by setting conditions that oblige the child to go to school, to find a job or a structured recreation schedule ('gestructureerde vrijetijdsindeling'). Specific conditions can also include community service or participation in a specific course.¹⁴⁹ According to article 493 (1) of the CCP the

¹⁴⁶ Act Amending Criminal Code, *Bulletin of Acts and Decrees* 2004, 351.

¹⁴⁷ The court can terminate the suspension *ex officio* or upon the request of the public prosecutor (art. 82 CCP).

¹⁴⁸ The CCP stands for the setting of bail or a (financial) guarantee of a third party and does not make any distinction between adults and children in this regard.

¹⁴⁹ Doek & Vlaardingerbroek 2006, p. 471-472. In this regard it is important to stress that the conditional suspension of pre-trial detention may not lead to negligence of the child's right to be presumed innocent until he is proven guilty; art. 40 (2)(b)(i) CRC; *cf* De Jonge & Van der Linden 2004, p. 143-144. The recent review of juvenile criminal law (1 February 2008; see para. 4.1) increased the opportunities regarding the determination of conditions. This may now even include participation in programmes meant to influence the child's behaviour, such as re-education programmes and intensive probation. See in this regard Imkamp 2006 who argues that training

court can instruct the Youth Care Organization, department of probation, to afford ‘aid and assistance’ (‘hulp & steun’). The child has the right to request suspension, also during detention.¹⁵⁰

Suspension of pre-trial detention can serve as an important instrument for the use of pre-trial detention as a measure of last resort and (if used later for the shortest appropriate period of time). The use of this instrument could furthermore be fostered by an actively involved lawyer, who provides the court with serious options for suspension (either directly or later).

C. Enforcement Modalities outside Institution

As mentioned before article 493 (3) CCP deliberately allows the execution of the child’s pre-trial detention (or remand in police custody; see above) in a less infringing setting (e.g. at home). *De facto*, the child is placed in a youth institution, more specifically in a remand home. Nevertheless, there are a few enforcement modalities which foster the child’s (continued) participation in the community, during pre-trial detention (*cf* e.g. rule 30 JDLs).

The first modality is a specific form of detention called ‘night detention’; the child must stay in a remand home during the evening, night and weekend, but attends school, vocational training or work during the day. Night detention was introduced nationally in 2003, after a successful experiment in Rotterdam and Amsterdam.¹⁵¹ In order to be admitted to a night detention programme the child must have a positive and customary manner of spending the day (i.e. school, vocational training or work) in the vicinity of the remand home. In addition, the child must sign an agreement in which he agrees to the conditions, such as going to school or work, not committing any new offences, not withdrawing from the detention daily in the evening, and during the night and on the weekend, and a daily screening on contrabands.¹⁵²

According to a former State Secretary of Justice, night detention has a positive influence on the achievements and behaviour of the children due to the structure and support provided during the night detention programme. In addition, the children are not deprived of their community, which enables them to maintain contact with society.¹⁵³

There have been experiments with electronic monitoring, which can be regarded as a second enforcement modality, facilitating the child’s detention at home (or

programmes in the pre-trial phase of the justice process may be in conflict with the presumption of innocence.

¹⁵⁰ This should not be confused with leave arrangements during detention (see para. 4.8). The latter do not suspend the detention.

¹⁵¹ See for more on this Bos & Mehciz 2001.

¹⁵² De Jonge & Van der Linden 2004, p. 145. Obviously, these conditions are demanding; one should avoid building in too high thresholds, *de facto* turning great opportunity into a ‘programme for failure’.

¹⁵³ *Parliamentary Documents II* 2001/02, 25 712, no. 3, p. 3.

elsewhere), but the State Secretary decided in March 2002 to end the experiment in favour of a national implementation of night detention.¹⁵⁴

In August 2006 the then Minister of Justice informed Parliament that experiences with the night detention programmes continue to be predominantly positive. The most recent evaluation shows that night detention is considered to be an instrument that enables the authorities to work with children on an individual and tailored basis. In addition, the children who participated, stressed that the programme had a positive influence on their broad basic performance. Nevertheless, the conductors of the evaluation identified some problems, resulting in a rather limited use of night detention. These problems *inter alia* included problems regarding regional placement (night detention only works if enforced in the child's region/community), transportation and a lack of awareness of the existence of night detention (which hampers the cooperation with other important partners, such as schools). In addition, the use of night detention is limited to the Western part of the country, due to the fact that this region has the required demographic infrastructure, which enables the child to be detained in the vicinity of school and work.¹⁵⁵ As a result, night detention cannot yet be regarded as a modality that offers an equal 'opportunity' for all children in the Dutch juvenile justice system (*cf* art. 2 CRC).

D. Pre-trial Detention for the Shortest Appropriate Period of Time?

Besides the lawful basis of the grounds and cases for pre-trial detention, the CCP provides clear time limits outlining the maximum duration of pre-trial detention (14 days of remand in custody and ninety days of detention in custody) before the trial must commence. However, again it lacks a child-specific approach. The same time limits apply to both children and adults.

Although these are maximum time limits, leaving room for diversion (i.e. the determination of the shortest appropriate period of time¹⁵⁶), the CCP does not contain a clear incentive to do so; by merely prescribing the maximum durations, *de facto* the maximum duration becomes the standard duration. One of the most significant omissions is that the CCP does not provide for frequent periodic review. In essence, a child can be detained for ninety days without interim review of the necessity of continuation of his detention; if the child has not been heard by the court, the pre-trial detention can be ordered for thirty days only. Still, this is not

154 *Parliamentary Documents II* 2001/02, 25 712, no. 3. See further Terlouw & Kamphorst 2002; the research shows that the experiments were rather positive; only the influx of children was limited and the experiments were competing with experiments with night detention; see also De Jonge & Van der Linden 2004, p. 145.

155 *Parliamentary Documents II* 2005/06, 24 587 and 28 684, no. 186, p. 1-2 with reference to Bos *et al.* 2006

156 De Jonge & Van der Linden argue that this option should be seriously considered concerning children; De Jonge & Van der Linden 2004, p. 143.

even close to the recommendation of the CRC Committee to review pre-trial detention every two weeks (GC No. 10, para. 83; see further para. 4.4).

In addition, the CCP lacks a child-specific approach regarding the commencement of the trial; it does not mandate starting the trial sooner for children in detention than for adults (*cf* GC No. 10, para. 83 in which the CRC Committee recommends thirty days as an acceptable term).

The lack of a child-specific approach also becomes apparent if one takes into account the CRC Committee's approach in GC No. 10 regarding the duration of the trial. Since the duration of pre-trial detention is strongly dependent on the duration of the trial, the Committee stressed that each child has the right to have his case 'determined without delay' (art. 40 (2) (b) (iii) CRC). In this light the CRC Committee recommended the setting of fixed time limits, which should be shorter than the adult system in this regard. This arguably covers the limits for pre-trial detention. It is hard to defend the Dutch CCP in this regard – in particular the continued detention without review for three months (*cf* GC No. 10, para. 83).

Moreover, the processing times (i.e. the time required to settle a juvenile criminal case; 'doorlooptijden') have been an issue for a long time.¹⁵⁷ In 1994 the Committee Van Montfrans concluded that the processing times in the Dutch criminal justice were too long. The Netherlands Supreme Court stressed, in 2000, the fundamental significance of a trial within a reasonable time (*cf* art. 6 ECHR) and explicitly distinguished between adults and children under the juvenile justice system in this regard. The Supreme Court ruled that a juvenile trial at first instance could endure for a maximum of sixteen months, eight months shorter than the maximum term of 24 months the Court found reasonable for adults.¹⁵⁸ Still, this position is rather cautious and one can question whether this term for juvenile cases can really be regarded as reasonable or without delay (art. 40 CRC). In 2001, the then State Secretary of Justice Kalsbeek announced that she would combat the processing times and set a new standard in juvenile cases of six months for trial at first instance (to be counted from the first police interrogation), a new standard, together with some other norms, referred to as the 'Kalsbeek norms'. This norm is in conformity with the recommendation of the CRC Committee in GC No. 10, para. 83.¹⁵⁹ In June 2006 the Council expressed its concerns (again) on the processing

¹⁵⁷ De Jonge & Van der Linden 2004, p. 155-157.

¹⁵⁸ The Netherlands Supreme Court, 3 October 2000, No. 00775/99 (LJN: AA7309), paras. 3.14 and 3.15.

¹⁵⁹ Still, this norm was regarded as too lenient; see, e.g. the Advice of the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ), 'Conceptnota Versterking aanpak jeugdcriminaliteit' of 4 February 2002, p. 20 (para. 7.4).

times, which according to the Council still are too long and do not meet the Kalsbeek norms.¹⁶⁰

In conclusion, the implementation of the requirement of the shortest appropriate period of time regarding pre-trial detention in the Netherlands is not without concerns. Therefore, the child's legal safeguards directly related to the imposition of pre-trial detention should be considered carefully (see para. 4.4). Furthermore, it is of significance that the court can always terminate the detention *ex officio* or upon the request of the child or the public prosecutor (art. 69 CCP).¹⁶¹

4.3.3.4 Youth Imprisonment

A. Child-Specific Sentence: Retribution, Proportionality and Differentiation According to Age

As mentioned earlier, the CrimCo provides for a separate set of juvenile justice sanctions, one of which is youth imprisonment; the principle custodial sentence executed in a youth institution is a maximum duration of twelve or 24 months, depending on the age of the child when he committed the crime (i.e. between 12 and 16 or 16 or older). The maximum duration of youth imprisonment is much lower than the maximum duration of imprisonment for adults (i.e. life imprisonment or maximum 30 years depending on the crime; art. 10 CrimCo).

Youth imprisonment is meant as retribution for the committed offence and the inherent violation of legal order. The imposition (and its duration) must be proportionate in light of the seriousness of the committed crime, the circumstances of the case and the personality of the child offender. If the committed crime has been (partially) caused by the child's background, limited or defective upbringing or other relevant factors, the enforcement of the imprisonment must be used to remedy the child's shortcomings as much as possible.¹⁶² This is of significance for the child's eventual reintegration into society (art. 40 (1) CRC). In light of the principle of last resort it is important that there are alternatives, such as the community service order (which is frequently used; see para. 4.1). Regarding imprisonment for the shortest appropriate period of time, it is important to note that the court has great discretion and the imposition of youth imprisonment is a matter of weighing up the circumstances mentioned above, while taking into account the principle of proportionality.

¹⁶⁰ Advice of the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ), Van 'pij' naar 'bij': advies over de verbetervoorstellen ten aanzien van de pij-maatregel of 29 June 2006, p. 4. The Council stresses that the norms are not met mainly due to time required for the reports on the child's personality and behaviour, caused by the lack of adequate staff and complexity of the work.

¹⁶¹ Note that the public prosecutor has the right to appeal; art. 71 (3) CCP. The child has not.

¹⁶² De Jonge & Van der Linden 2004, p. 83 with reference to *Parliamentary Documents II*, 1991/92, 21 327, no. 6, p. 13.

As mentioned in paragraph 4.1, the 1995 juvenile criminal law review represented a doubling of the maximum duration of youth imprisonment; a significant and deliberate aggravation of the penal law for children. It was the legislator's intention to be more repressive in order to maintain the deterrent effect of the juvenile justice system.¹⁶³ In addition, this would decrease the difference between juvenile justice and the adult criminal justice system, which would lessen the court's need to impose the treatment order. According to De Jonge & Van der Linden the 1995 review pushed back the aim of special prevention in favour of general prevention.¹⁶⁴

This law revision has placed the principle of proportionality in a different perspective, which also has implications for the implementation of the shortest appropriate period of time. In light of the lack of guidance by the international human rights framework regarding allowed (maximum) sentences, it is hard to tell whether the maximum duration of twelve or 24 months is in conformity with that framework. It is clear that one or two years of incarceration in the six-year period, from twelve to eighteen, is a significant time. The figures presented in paragraph 4.1 show that youth imprisonment longer than one year is not imposed frequently.

However, the rationale behind the present system raises questions. The rationale behind the 1995 system review was to aim more on repression than on addressing the child's successful reintegration. This is worrisome in light of article 40 (1) CRC and it has increased the pressure on the use of youth imprisonment for the shortest appropriate period of time.

B. Suspended Sentencing

An option of significance for the principle of last resort is the imposition of a suspended sentence. As pointed out in paragraph 4.1 not all youth imprisonments lead to deprivation of liberty; a significant number of the youth imprisonments are not executed under conditions (i.e. a suspended youth imprisonment). The CrimCo explicitly provides for the imposition of a suspended youth imprisonment (art. 77x (1) CrimCo).¹⁶⁵ The court can order that the sentence will be suspended under the general condition that the child, within the 'operational period' ('proeftijd') of a maximum of two years,¹⁶⁶ shall not commit any criminal offence (art. 77z CrimCo). The court can additionally order special conditions and has much discretion in this regard,¹⁶⁷ but the conditions must be related to the child's behaviour and they must not limit the child's freedom of religion or his political rights.¹⁶⁸

¹⁶³ De Jonge & Van der Linden 2004, p. 84 with reference to *Parliamentary Documents II*, 1992/93, 21 327, no. 13, p. 5.

¹⁶⁴ De Jonge & Van der Linden 2004, p. 84.

¹⁶⁵ As mentioned in para. 4.3.2 the court can also order a suspended treatment order.

¹⁶⁶ Art. 77y CrimCo. This operational period can be extended for another year; art. 77cc CrimCo.

¹⁶⁷ Cf the conditions regarding suspension of pre-trial detention as discussed above.

¹⁶⁸ Art. 77z (1) CrimCo. Note that such a provision cannot be found regarding the suspension of pre-trial detention.

The Public Prosecution Office is charged with the supervision. The court can order the Youth Care Agency, more specifically the youth probation department or in special circumstances even a specific person, to provide for ‘aid and assistance’ (art. 77aa CrimCo). This can be of great importance. One can argue that the child should be assisted in every possible way, in order to increase the chances that he will manage not to violate the conditions and there will be no need to enforce the imprisonment or treatment order.

If the child violates one of the conditions, the Public Prosecution Office can demand the execution of the suspended sentence; the court needs to order execution (art. 77dd (1) CrimCo). The court can do so in the event of a violation of a special condition, but this is not compulsory. If the child is accused of having committed a new crime, it is the court, before which the new allegation is brought, that is competent to order the execution of the suspended sentence.¹⁶⁹

Although suspended youth imprisonment is significant for the implementation of the principle of last resort, one should be aware of the fact that the court can order the child’s commitment to an institution as one of the specific conditions (art. 77z (2) CrimCo). This cannot be a youth institution, but can, for example, be a drug rehabilitation clinic.¹⁷⁰ This has been confirmed by the Netherlands Supreme Court, which has ruled that placement in a youth institution cannot be ordered as a specific condition to a suspended youth imprisonment (article 77x (1) jo. 77z (2) jo. arts. 1, 3a and 3b YCIA). However, the Netherlands Supreme Court has also ruled that placement in the ‘Glen Mills School’ can be ordered.¹⁷¹ The Glen Mills School is a youth care facility, a borstal based on a programme developed in the US and falls under the responsibility of the Ministry of Health Care. Strictly, it cannot be regarded as a closed facility (i.e. children can leave) and it is not a youth institution, falling under the responsibility of the Ministry of Justice. Nevertheless, children are not permitted to leave at will and they are particularly dependent upon the institution’s regime.¹⁷² Moreover, the programme implies far-reaching limitations of human rights and freedoms. Consequently, placement in this school undoubtedly constitutes deprivation of liberty.

Thus, although suspended youth imprisonment cannot lead to deprivation of liberty by placement in a youth institution, it may very well lead to deprivation of

¹⁶⁹ Only in the latter situation can the child appeal the execution of the suspended sentence (art. 77ee (1) jo. 14j (1) CrimCo). The child is entitled to legal representation and he must be awarded legal counsel (art. 489 (2) CCP).

¹⁷⁰ De Jonge & Van der Linden 2004, p. 115; *Parliamentary Documents* 1989/90, 21 327, nr. 3, p. 38.

¹⁷¹ The Netherlands Supreme Court, 12 December 2006, No. 03641/05 J (LJN: AZ0699), paras. 3.3.1, 3.3.2 and 3.4. This case affected a suspended treatment order; see also the Netherlands Supreme Court, 5 June 2007, No. 00326/06 (LJN: AZ9687), which affected a suspended youth imprisonment.

¹⁷² Cf The Council’s Monitoring report regarding Glen Mills School based on visit of 16 November 2004, p. 5.

liberty by another placement, for example in the Glen Mills School.¹⁷³ Consequently, the value of suspended youth imprisonment as an instrument of significance for the implementation of the principle of last resort decreases with this application. Still, it could be defended in light of finding the best appropriate place for the child, but this requires specific clarification.

C. Early (Conditional) Termination

Regarding the duration of youth imprisonment, it is important to stress that the CrimCo provides for the possibility of early (conditional) termination of youth imprisonment. Unlike under the adult penal system there is no automatic early release regarding youth imprisonment (art. 15 CrimCo). Instead the court has the discretion to terminate the child's youth imprisonment under conditions at any time (art. 77j (4) CrimCo), which can serve as an important tool for positively influencing and rewarding the child's behaviour.¹⁷⁴ This legal option is of particular significance for implementation of the requirement of shortest appropriate period of time.¹⁷⁵

4.3.3.5 Treatment Order

A. Penal Measure: Last Resort and Meant to Serve Interests of Child and Society

As mentioned in paragraph 4.3.2, the CrimCo provides an enumeration of cumulative criteria for the imposition of a treatment order, a penal measure depriving the child of his liberty and ordering his individual treatment. The Dutch legislator has deliberately built in a (high) threshold meant to limit the use of the treatment order, which contributes to the use of the treatment order as a measure of last resort.¹⁷⁶ The treatment order should only be used in severe cases and only if there are no other options that meet the requirements of the 'danger criterion' and the interests and needs of the child ('assistance criterion').

These criteria not only provide for more explicit guidance on the content (i.e. the elements) of the principle of last resort regarding this measure, they also provide a link between the principle of last *resort* and the requirement of the shortest

¹⁷³ The Netherlands Supreme Court has stressed that placement in an institution as a special condition may not be indefinite. The court imposing the suspended sentence must set a period of time, which moreover is bound by the maximum duration of the suspended sentence (i.e. two or three years). The Netherlands Supreme Court, 12 December 2006, No. 03641/05 J (LJN: AZ0699), para. 3.6; The Netherlands Supreme Court, 5 June 2007, No. 00326/06 (LJN: AZ 9687), para. 4.3.

¹⁷⁴ Doek & Vlaardingerbroek 2006, p. 507. The court orders an 'operational period' of two years maximum and the rules regarding suspended sentences apply equally (see below). See art. 18 of the 1994 Decree Enforcement Juvenile Criminal Law ('Besluit tenuitvoerlegging jeugdstrafrecht 1994').

¹⁷⁵ There is another option for a child to have his imprisonment terminated: he can apply for parole. It is the Queen of the Kingdom of the Netherlands who grants parole; Art. 558 CCP; *cf* the 1988 Parole Act ('Gratiewet').

¹⁷⁶ De Jonge & Van der Linden 2004, p. 104 with reference to *Parliamentary Documents II*, 1991/92, 21 327, no. 6, p. 13-15.

appropriate period of time (see below); in essence, this is an approach that can be considered a resort for the child and which aims to provide the (shortest) appropriate response, while not losing sight of the damage done to (or future damage) society and victims.¹⁷⁷

The cumulativeness of the enumerated criteria implies that they are of equal value. The potential tension between the different criteria (in particular the danger and assistance criteria) has been discussed in parliament. The then State Secretary of Justice found such tension unlikely, due to the fact that both criterion will point in the same direction, but he also argued that if this is not the case, the measure must not be ordered.¹⁷⁸ This is significant information. On the one hand the equality between the different criteria implies that the interests of society cannot be decisive if the order is considered not in the interests of the child (art. 3 jo. 40 (1) CRC). On the other hand, the measure should not be used if there is no ‘criminal justice interest’. In other words, it clearly is meant as a penal measure; if the child merely requires treatment he should be directed to the child protection or (mental) health care system.¹⁷⁹

Furthermore, the application of the different criteria requires a careful explanation by the court, regarding the question of why the court chooses to resort to this most far-reaching disposition and why the court regards this as the best resort available. In this regard it is important to note that the appropriateness of the order should be determined on the basis of a child’s assessment conducted by at least two behavioural experts – one of the requirements for imposition (art. 77s (2) CrimCo).¹⁸⁰

The enforcement of the treatment order has been subject to research and debate.¹⁸¹ A study on criminal files of 2000 in the district of ’s-Hertogenbosch revealed that the legal criteria leave too much room for improper use by the court. The researcher argued *inter alia* that the research shows that where treatment was ordered for children who had committed offences that were not serious enough, the ‘assistance

¹⁷⁷ Although it is argued that it is questionable whether the treatment order is a ‘resort’ at all, since little is known about the treatment programmes and their results/effects in youth institutions; De Jonge & Van der Linden 2004, p. 106 with reference to Duits & Harkink 2001, p. 300.

¹⁷⁸ De Jonge & Van der Linden 2004, p. 104 with reference to *Parliamentary Documents II*, 1991/92, 21 327, no. 6, p. 14.

¹⁷⁹ Note that above the imposition of the treatment order requires that the child be convicted for committing a serious offence (1st criterion).

¹⁸⁰ One of these experts can be a psychiatrist; this is only compulsory if the child suffered from ‘limited development and mental disorder’ (‘gebrekkige ontwikkeling of ziekelijke stoornis van de geestvermogens’) when committing the offence (see para. 4.3.2). De Jonge & Van der Linden argue that in order to reach the best decision it is of importance that the judges, who *de facto* are not always juvenile judges, have sufficient knowledge about treatment programmes, etc.; De Jonge & Van der Linden 2004, p. 108.

¹⁸¹ See De Jonge & Van der Linden 2004, p. 105-106.

criterion' leaves too much room to treat the child as an object of the system, rather than as the subject of rights and that the criterion was interpreted very broadly, for example as a way to avoid the waiting list for treatment centres for children under the child protection system. The researcher concluded that the legal criteria must be tightened and suggested limiting the application of the treatment order to children who were considered to have (severely) diminished or no capacity at the time they committed the offence.¹⁸²

Another small-scale research project, published in 2003, reveals that the treatment order is mainly used as an instrument for upbringing. In the cases studied, the presence of the 'danger criterion' often was explained very badly or not at all. There were cases in which danger could hardly be considered present, while the court nevertheless ordered the child's treatment. The 'assistance criterion' was paramount in the reports by the behavioural experts.¹⁸³

In 2005 Groenendaal and Rutgers van Rozenburg raised questions regarding the practice of prolonging (see below) the treatment order and the meticulous employment of the three criteria. They argue that due to lack of alternatives, courts are too quickly forced to prolong the order even if this leads to erosion of the criteria.¹⁸⁴

In this regard, it is important to stress that the treatment order as a measure of last resort can only be effectively implemented if there are serious alternatives to consider. Lack of modalities between the suspended youth imprisonment (see above) and the treatment order have been reasons for the Dutch legislator to develop the recently adopted measure meant to change juveniles' behaviour (para. 4.1).¹⁸⁵

The order's initial duration is determined by the law, as are the rules regarding prolongation. The treatment order has an initial fixed duration of two years. Article 77s CrimCo does not leave room for an initial order of less than two years, which actually gives the order a minimum and mandatory (initial) duration.¹⁸⁶ The court does not have the discretion to assess the initial duration, which is rather curious in light of the requirement of the *shortest* appropriate period of time. Still, the appropriateness of the treatment order as such needs to be assessed by the court.

Depending on the circumstances of the case it can be prolonged by the court up to a maximum of six years, albeit limited to violent crimes or sex offences and children with a limited development or mental disorder, respectively (arts. 77s and 77t CrimCo; see para. 4.3.2). It is hard to consider four or six years a short period of

¹⁸² De Jonge & Van der Linden 2004, p. 105 with reference to Schnier 2000, p. 14-15.

¹⁸³ *Ibid.*, p. 105-106 with reference to Stevens & Van Marle 2003, p. 221-234.

¹⁸⁴ Groenendaal and Rutgers van Rozenburg 2005, p. 79ff. This can also negatively affect the use of the measure for the shortest appropriate period of time.

¹⁸⁵ *Parliamentary Documents II* 2004/05, 30 332, no. 3, p. 6.

¹⁸⁶ As mentioned in para. 4.3.2 the court can order that the treatment order (partly) not be executed; art. 77x CrimCo.

time, particularly for a child. It may however be appropriate in some cases.¹⁸⁷ Therefore one must carefully consider the need for prolongation and the duration (note that unlike regarding the initial term, the court can prolong the treatment order for less than two years and more than once ‘up to’ a maximum of four or six years), which requires sufficient and adequate information on the child’s progress within the treatment programme and the expectations regarding the realization of the treatment’s objectives. The public prosecutor, in charge of the decision to demand prolongation, must submit written advice of the director of the youth institution, including a report with notes regarding the child’s mental and physical health.¹⁸⁸ The law does not prescribe that two experts must again advise the court on the presence of the ‘danger criterion’ and ‘assistance criterion’. It is, however, logical that the director of the youth institution advises the court on these elements.

The advice and report are of importance for the court to receive information on the development of the child and on the need for prolongation, for a certain period of time. This should enable the court to decide whether the prolongation of the order would meet the requirements of article 37 (b) CRC – the use of treatment order for the shortest appropriate period of time.

In light of this requirement it is furthermore important to reiterate that the treatment order is meant as a measure and not as a sentence. Although the order is not limited to cases in which the child’s criminal responsibility was partly or completely absent, it can, even if the child can be held fully responsible, within the boundaries set by the law, be ordered for a duration that is regarded appropriate, but which may go beyond the boundaries of the principle of proportionality (see also para. 3.4). This tension is inherent in a measure like the treatment order, although this does not imply that a child can be deprived of his liberty indefinitely for the sake of society’s interests. In this regard the periodic review (i.e. the prolongation sessions) built into the CrimCo is of particular significance. In addition, it is important to note that, although *de facto* hardly ever used, the Minister of Justice has the authority to (conditionally) terminate the treatment order earlier (art. 77s (8) CrimCo). As with regard to early conditional release from youth imprisonment, this could be used as an incentive to motivate (and reward) a child’s positive development on his way to successful reintegration.

B. Enforcement – Waiting Lists

As mentioned in paragraph 4.2, the treatment order will in principle be executed in a youth institution, more specifically in a treatment centre (art. 77s (5) CrimCo jo. art. 10 (1) (a) YCIA). The measure may be enforced in an open institution or other

¹⁸⁷ Note that the treatment order under adult penal law can be prolonged indefinitely; art. 38d jo 38e CrimCo).

¹⁸⁸ If the director has not been able to draw up his advice, due to the lack of cooperation of the child, the court can still prolong the treatment order; art. 77t (6) CrimCo; cf art. 77t (2) CrimCo.

facility.¹⁸⁹ If an appropriate treatment centre is not available the child can be placed (temporarily) in a remand home (art. 9 (2) (d) YCIA). Based on article 11 YCIA he must be placed in an appropriate treatment centre within three months, a term which can be prolonged if regarded necessary by the selection official, responsible for the placement of children in youth institutions. This exception is particularly meant to cope with capacity shortage¹⁹⁰ and is to a certain extent acceptable under International Human Rights Law.¹⁹¹

Unfortunately, *de facto* children are often held in remand homes for long periods of time due to the long waiting lists. It is hard to identify exactly how long children are waiting for the appropriate placement on average. The 2006 Annual Report of the National Agency for Correctional Institutions shows that in that year, only 35.6% of the children with a treatment order were placed in a treatment centre within three months (art. 11 YCIA).¹⁹²

In September 2005 the Appeals Committee of the Council for the Administration of Criminal Justice and Youth Protection (hereinafter: Appeals Committee¹⁹³) ruled that if a child under a treatment order is not placed in an appropriate facility within six months, the deprivation of liberty becomes unlawful.¹⁹⁴ The Appeals Committee grounded its ruling on the jurisprudence of the Appeals Committee for adults under a treatment order, and the ECtHR jurisprudence, in particular the case of *Brand v.*

¹⁸⁹ Although the CrimCo leaves room for immediate placement in an open setting, the policy in practice is that children under a treatment order will be placed in a closed youth institution first; Bartels 2003, p. 171-173.

¹⁹⁰ Explanatory Memorandum YCIA, p. 75. See Appeals Committee, 10 May 2004, 04/0374/JW for additional procedural rules set by the Appeals Committee (motivated decisions in writing and, before the second prolongation, a hearing of the child).

¹⁹¹ See, e.g. ECtHR, Judgment of 11 May 2004, Appl. No. 49902/99 (*Brand v. The Netherlands*), para. 64. Cf ECtHR, Judgment of 29 February 1988, Series A no. 129 (*Bouamar v. Belgium*) and ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (*D.G. v. Ireland*), regarding art. 5 (1)(d) ECHR; see para. 3.4.

¹⁹² DJI Annual Report 2006, p. 50. Figures regarding earlier years were based on another norm (i.e. placement within one month), resulting in different percentages. In 2003, 3.5 % were placed in a treatment centre within one month, in 2004: 0% and in 2005: 11% . According to the Minister of Justice in 2005, 65% of the children with a treatment order were placed in a treatment centre within 3 months; 79% within 6 months (i.e. 20% of the children were not placed within six months); *Parliamentary Documents II* 2005/06, 24 587 en 28 741, no. 183, p. 8. Note the remarkable difference between 2005(65% within 3 months) and 2006 (35% within 3 months).

¹⁹³ This Appeals Committee is competent to hear appeals under the YCIA. There is one Appeals Committee specifically for children and there are two Appeals Committees for adults (one for adults in prisons or remand homes and one for adults in treatment centres); see further para. 4.10.

¹⁹⁴ Appeals Committee, 12 September 2005, 05/1351/JW and 05/1789/JW. Beforehand, the Appeals Committee had not been very clear on the maximum period of time a child could be held in a remand home. It considered an appeal against prolongation, due to capacity problems, not necessarily valid, but once argued that it may very well be, if the child has not been placed in the right facility after one year; Appeals Committee, 10 May 2004, 04/0374/JW.

The Netherlands.¹⁹⁵ In this case the ECtHR ruled that although a certain delay is inevitable and acceptable, a waiting period of six months (as set by article 12 Hospital Orders (Framework) Act (for adults); *cf* art. 11 YCIA) or more violates article 5 (1) ECHR, taking into account that such a significant delay implies a significant delay in the individual's treatment programme. This 'will obviously affect the prospects of the treatment's success' (*Brand v. The Netherlands*, para. 65) and it may very well result in prolongation of the treatment order. Moreover, the ECtHR took into account the fact that the waiting lists issue is structural (since 1986; *Brand case*, para. 66) and that there were no exceptional or unforeseeable circumstances.

The Appeals Committee for children incorporated this approach and adopted it as part of its own jurisprudence¹⁹⁶: if a child has not been placed in a treatment centre within six months or more, his deprivation of liberty becomes unlawful. Consequently, he has the right to compensation of €350.- per month, which increases by €125.- per month after each period of three months.¹⁹⁷ In March 2007 the Appeals Committee recommended the Minister of Justice to grant this compensation to each child waiting for six months or longer, regardless of whether they have used legal remedies to challenge their detention.¹⁹⁸

The Appeals Committee could have chosen a stricter approach. It is arguable that children are entitled to a speedier approach than adults, based on article 37 (b) CRC's requirement of the shortest appropriate period of time. The relevant factors constituting unlawful deprivation of liberty – a delay of the treatment programme, the negative impact on the chances of a successful reintegration (*cf* art. 40 (1) CRC) and the potential prolongation of the treatment order – may affect children even more significantly. Children are, as the Council has put it, 'in a hurry',¹⁹⁹ particularly given the relatively short term for treatment (a maximum of six years).

Furthermore, the judgment of the Appeals Committee cannot be considered systematically correct. The Appeals Committee for adults under a treatment order (and the ECtHR) has aligned with the period of time set by article 12 of the

¹⁹⁵ ECtHR, Judgment of 11 May 2004, Appl. No. 49902/99 (*Brand v. The Netherlands*), para. 64ff; see also ECtHR Judgment of 11 May 2004, Appl. no. 48865/99 (*Morsink v. The Netherlands*).

¹⁹⁶ *Cf* Appeals Committee, 20 July 2006, 06/0971/JW and Appeals Committee, 28 March 2007, 06/3181/JW.

¹⁹⁷ The Appeals Committee has also ruled that the compensation should be reserved for, e.g. the child's education after his release; a rather paternalistic point of view, especially if one takes into account the fact that the child may have reached the age of majority upon release.

¹⁹⁸ Appeals Committee, 28 March 2007, 06/3181/JW with reference to the jurisprudence of the Appeals Committee for adults under a treatment order.

¹⁹⁹ Advice of the Council for the Administration of Criminal Justice and Protection of Juveniles, 'De justitiële jeugdinrichtingen na 2010, Advies naar aanleiding van de nota "Een visie op de justitiële jeugdinrichtingen in het strafrechtelijk traject"', of 30 March 2007, p. 7. (Advice on Youth Institutions after 2010)

Hospitals Orders (Framework) Act, that is: *six* months. Article 11 YCIA, however, provides for a shorter term: *three* months. This would indicate that regarding children, a waiting term of three months or more (already) violates the law. It is remarkable that the Appeals Committee explicitly considered that a shorter term for children would be more appropriate, but that it has not ruled accordingly.²⁰⁰

The Appeals Committee did, however, once rule that a waiting period of three months breached the law.²⁰¹ According to the Committee it was the particular circumstances of this case (i.e. the child's young age, his (light) retardation and the fact that the issue of waiting lists, which is not addressed by the government in a structural way, is of extra concern for this specific group of children) that justified a lower threshold.

The waiting lists issue can also affect a child if the institution where he stays or used to stay applies for re-selection (i.e. request for transfer to another facility). Article 11 YCIA applies equally in such situation.²⁰² In another case, a child in a treatment centre did not return after leave.²⁰³ After his arrest and temporary placement in a remand home, the child's former treatment centre applied for re-selection. The Appeals Committee ruled that in such case the point of departure must be that the treatment programme must be resumed as soon as possible.²⁰⁴ Subsequently, the Appeals Committee ruled that the selection official must find the child an appropriate place in a treatment centre within the period of *four* months.²⁰⁵ By doing so, the Appeals Committee filled a legal gap, although it has not clarified why it chose the period of four months.²⁰⁶

In conclusion, structurally long waiting lists jeopardize the implementation of the legal requirement of shortest appropriate period of time regarding children under a

200 Appeals Committee, 12 September 2005, 05/1351/JW and 05/1789/JW. Moreover, it turns out that the Appeals Committee can be rather formalistic. The Appeals Committee, 23 January 2007, 06/2666/JW, refused compensation for a child who had waited for six months and six days. The Appeals Committee argued that it is 'common practice in court procedures' to consider 0 to 15 days as 0 days.

201 Appeals Committee, 28 July 2006, 06/0582/JW.

202 Appeals Committee, 26 August 2004, 04/0911/JB.

203 Appeals Committee, 27 June 2007, 07/160/JB and 07/466/JB.

204 According to the Appeals Committee this was even more required given the fact that the child in this particular case had a slight retardation.

205 If not, the regular financial compensation must be granted.

206 A related issue is that a child will not be placed on a waiting list if he appeals the initial conviction. The Council finds this undesirable and recommends placing the child on the waiting list immediately after the first sentence, even if the child exercises his right to appeal; Advice of the Council for the Administration of Criminal Justice and Protection of Juveniles, Van 'pij' naar 'bij': advies over de verbetervoorstellen ten aanzien van de pij-maatregel of 29 June 2006, p. 4 (recommendation regarding improvement execution of a treatment order).

treatment order.²⁰⁷ This can (eventually) lead to violation of prohibition of unlawful deprivation of liberty (art. 37 (b) CRC, art. 5 (1) ECHR and art. 9 (1) ICCPR). A delay in the child's treatment can eventually lead to prolongation of the order (or, if prolongation is not permitted, to termination of the order potentially without any significant results).²⁰⁸

The Dutch Appeals Committee has renounced a waiting term longer than six months as unlawful under article 5 (1) ECHR and ordered financial compensation. This certainly is a step forward in forcing the Dutch government to address and solve the issue of waiting lists in a structural way. Unfortunately, it is questionable whether this jurisprudence really is an incentive for the Ministry of Justice to solve the issue. Purely from a financial point of view it arguably is not; violation of the law, however, should have its affect.²⁰⁹

However, the Appeals Committee could (and should) have gone further. Strict, shorter waiting periods for children certainly is appropriate. This finds support in International Human Rights Law, particularly in article 37 (b) CRC.²¹⁰

4.3.4 Conclusion

This paragraph has addressed the legal requirements concerning deprivation of liberty of children in the Dutch juvenile justice system. Children's arrest, police custody, pre-trial detention, youth imprisonment and treatment order were assessed in light of the prohibition of unlawful or arbitrary deprivation of liberty, and more specifically, the requirements of last resort and shortest appropriate period of time.

In general, the prohibition of unlawful deprivation of liberty has been adopted in the Dutch Constitution and all of the above mentioned forms of deprivation of liberty have a clear and solid foundation in statutory law, as has the balance of relative competence between law enforcement, Public Prosecutions Office and the court. Arbitrary deprivation of liberty is not explicitly prohibited in Dutch law, but the relevant legal provisions as such are not arbitrary. Both the CCP and CrimCo

²⁰⁷ It has also impact on the placement of children in treatment centres under child protection law (see, e.g. Court of Appeal of Leeuwarden, 3 April 2008, LJN: BC8802; District Court of Groningen, 20 December 2006, LJN: AZ5794 and LJN: AZ5807); art. 11 YCIA is, however, not applicable to this group of children.

²⁰⁸ Moreover, this practice is hard to explain in relation to the children concerned (and their families).

²⁰⁹ In 2006, the Minister of Justice promised to investigate the possibility of having 80% of the children placed within six weeks from January 2008, and that from 2008 the legal time limit for placement of three months will no longer be exceeded, except in the event of exceptions and special arrangements. The appropriate placement may require such a specialized response (i.e. placement in a specialized facility), that one should be willing to accept a certain waiting time, according to the Minister; *Parliamentary Documents II* 2005/06, 24 587 en 28 741, no. 183, p. 8. In the future, the distinction between remand homes and treatment centres will be abolished. As acknowledged by the Minister, this will diminish the waiting lists, but does not necessarily mean that the underlying issue (i.e. finding each child the appropriate placement) is solved.

²¹⁰ See paras 3.8 and 4.7 for more on selection and placement of children.

provide instruments, means and sometimes even particular guidance for the use of deprivation of liberty as a measure of last resort and for the shortest appropriate period of time. Still there are some critical final remarks that should be made.

With regard to arrest, police custody and pre-trial detention the grounds are formulated broadly, which require legal safeguards to avoid arbitrary usage. Some safeguards are already built in, for example through the mandatory judicial check by the examining judge after three days and a maximum of 15 hours after the arrest (see further para. 4.4). Nevertheless, the legal system regarding the pre-trial phase hardly makes a significant distinction between children and adults, which makes a child-specific approach fully dependent on the enforcement authorities, including the courts.

There is one child-specific provision with particular potential for the implementation of the principle of last resort, article 493 CCP. It leaves room for the execution of police custody or pre-trial detention at another place than the police station or remand home. Although it is hardly ever used, one could for example think of less restrictive forms of deprivation of liberty, such as home confinement. In addition, and this can be regarded as another key element for the implementation of the last resort principle; article 493 CCP places the examining judge and court under the obligation to consider the (conditional) suspension of the pre-trial detention, which at a minimum should imply that the judiciary is under the duty to explain why it does not suspend the detention. Furthermore, an interesting modality of pre-trial detention is ‘night detention’, a constructive form of (non-suspended) pre-trial detention, although it is not (yet) available in every part of the country.

In this stage of the juvenile justice process, article 16a YCIA is a provision that is worrisome, particularly in light of the prohibition of arbitrary deprivation of liberty. It allows the selection official, a civil servant encumbered with the selection and placement of children, to order a child’s continued detention at the police station in the event of lack of capacity in youth institutions or if transportation cannot be arranged. By doing so, the executive power can set aside (or suspend) an order of a court of law. This can hardly be regarded as appropriate, in particular because the police station is not an appropriate place for children and it is likely that a child there will not be adequately separated from adults (*cf* art. 37 (c) CRC). Moreover, the child has no legal remedies to challenge this decision.

Furthermore, the processing times deserve constant attention since they affect the duration of pre-trial detention and influence its use for the shortest appropriate period of time.

The dispositions resulting in deprivation of liberty in the Dutch juvenile justice system are child-specific, although partly undermined by the possibility to sentence children of sixteen or seventeen when they committed the offence, under adult penal law (art. 77b CrimCo). Youth imprisonment is a repressive sanction and

consequential that may only be imposed in full respect of the principle of proportionality. The Dutch CrimCo does limit its duration depending on the age of the child when he committed the offence, to a maximum period of 12 to 24 months. Still, these maximum durations are twice as long as they used to be, before 1995. It is the court that must balance the appropriateness of the imposition of youth imprisonment. Suspended youth imprisonment is widely used, which should be supported, but its value for the principle of last resort may lose its meaning if a child ends up deprived of his liberty anyway (e.g. in a borstal or reformatory).

The treatment order is surrounded by legislative requirements and instructions. The legislator has tried to influence the enforcement of the treatment as a measure of last resort through building in barriers (i.e. requirements). Some studies have questioned the use of the treatment order as a measure of last resort. Although recent figures show a rather stable number of treatment orders per year (see para. 4.1), there has been an increase in the use of the treatment order in the first decade after 1995. Furthermore, the criterion of assistance seems to be decisive to a large extent and it is argued that the courts have used the order to avoid delays which would not have occurred if children were committed under the child protection system. Moreover, significant and structural waiting lists have negative consequences for the enforcement as a measure for the shortest appropriate period of time, which is in conflict with International Human Rights Law and will lead to a breach if the child is not placed appropriately within six months. However, a shorter term of three months is defensible and appropriate.

In general, Dutch criminal law does not contain a domestic legal provision proclaiming the use of arrest, detention or imprisonment as a measure of last resort or for the shortest appropriate period of time (*cf* e.g. the current ground for the family supervision order; art. 1:254 BW). It would be advisable to adopt these child-specific requirements in Dutch law, more specifically in the CrimCo and CCP. This would make the requirements legally binding in the Dutch legal system. In addition, it would force courts (or other competent authorities) to explicitly explain why police custody, pre-trial detention, youth imprisonment or treatment order is considered an appropriate resort and why for the ordered period of time.

Although, the conclusion seems to be justified that in general the Dutch practice of depriving children of their liberty under the juvenile justice system is based upon statutory law and does in general not violate International Human Rights Law, apart from the waiting lists issue, this study has been unable to study the level of arbitrariness in the decision-making process; well explained and tailored decisions would contribute to more transparency and enable future research/follow up.

Before concluding, one should note that article 77b CrimCo, which allows the court to sentence the child offender according to adult law, may have serious implications in light of the requirement of the shortest appropriate period of time. Although life imprisonment for these children has been prohibited since 1 February 2008 (art. 77b

(2) new CrimCo), a sixteen or seventeen year old child can be sentenced to thirty years of imprisonment. This can hardly be considered imprisonment for the shortest appropriate period of time, particularly when the application of adult penal law is grounded on the seriousness of the crime only.²¹¹

Finally, it is important to stress that for the implementation of the legal requirements of International Human Rights Law, a number of procedural legal safeguards are of significance. These include the right to legal and other appropriate assistance to challenge the legality of deprivation of liberty and will be addressed in the following paragraph.

4.4 LEGAL SAFEGUARDS FOR CHILDREN DEPRIVED OF THEIR LIBERTY

4.4.1 Introduction

In order to guarantee the use of arrest, detention and imprisonment as a measure of last resort and for the shortest appropriate period of time and, in general, to prevent unlawful or arbitrary deprivation of liberty, legal safeguards are of eminent importance. Under International Human Rights Law these include the right to legal and other appropriate assistance, to (prompt) information on the reasons for arrest and charges, to challenge the legality of the deprivation of liberty and to compensation in the event that it was unlawful or arbitrary. Each child deprived of his liberty is entitled to these safeguards, which can also be of significance for the quality of treatment during deprivation of liberty.

This paragraph addresses the most prominent safeguards embodied in the Dutch legal system, in light of the international legal framework as highlighted in paragraph 3.4.6.

4.4.2 Right to Legal and Other Appropriate Assistance

As soon as a child, like any other person, is (about to be) remanded in police custody the police has to notify a defence counsel roster service ('piketdienst'; art. 40 CCP). This service will provide the child immediately with legal assistance by a 'duty lawyer', free of charge.²¹² Each child suspect has the right to be assisted by a (chosen or appointed) lawyer (art. 28 CCP). In addition, the lawyer has free access to his client during the child's police custody (and subsequent pre-trial detention; art. 50 CCP), which includes the fact that he can speak with the child in private and

²¹¹ As mentioned before, the grounds for application of art. 77b CrimCo are formulated alternatively. It potentially allows for the application of adult penal law, grounded on the seriousness of the crime only. The other grounds, the personality of the child offender or the circumstances of the case, may be irrelevant.

²¹² De Jonge & Van der Linden 2004, p. 141.

correspond confidentially. These provisions are relevant for the implementation of article 37 (d) CRC, but do not imply that the child has the *right* to have his lawyer present during police interrogations.²¹³ *De facto*, there often is no legal assistance during the first interrogations.²¹⁴ Although International Human Rights Law does not explicitly provide the right to legal assistance during (the initial) police interrogations, the denial of legal assistance can be on strained terms with the child's right to the assistance of a lawyer in the preparation and presentation of his defence (art. 40 (2) (b) (ii) CRC), in particular because these interrogations tend to be of great significance for collecting evidence and the child has to make important (strategic) decisions at this particular point.²¹⁵ In addition, legal assistance could safeguard the child's treatment with humanity, with respect for his dignity and in a child-specific manner. It could also prevent the child from being intimidated by the police and being forced to confess (in violation of the *nemo tenetur* principle; art. 40 (2) (b) (iv) CRC). In this regard, the need for (legal) assistance during all police interrogations arguably is bigger for children than for adults. Moreover, it is defensible that the arrested child can claim the presence of his lawyer under his right to legal and other assistance embodied in article 37 (d) CRC.²¹⁶

In May 2007, the CAT Committee expressed its concerns in this regard by observing that 'with regard to the European part of the Kingdom of the Netherlands, the Committee was concerned that persons in police detention did not have access to legal assistance during the initial period of interrogation'. The CAT Committee recommended the government to 'review its criminal procedures so that access to a lawyer, as a fundamental legal safeguard, is guaranteed to persons in police custody from the very outset of their deprivation of liberty, particularly where video or audio recording of interrogations, which cannot in anyway substitute the presence of legal counsel, are not in place'.²¹⁷

If the public prosecutor demands pre-trial detention, the child will be provided with a lawyer appointed by the court (art. 489 (1) (c) CCP). Based on article 63 (4) CCP

²¹³ The Netherlands Supreme Court, 22 November 1983, *NJ* 1984, 805, para. 6.3.1.

²¹⁴ Doek & Vlaardingerbroek 2006, p. 464.

²¹⁵ *Ibid.*, p. 465; cf ECtHR, Judgment of 8 February 1996, Appl. No. 18731/91 (*John Murray v. UK*). See Coster van Voorhout & Franken 2008, p. 366-368, who also point at the significance of legal assistance in this regard, particularly due to the 'dominance' of the (pre-trial) criminal investigation in the Dutch criminal justice system.

²¹⁶ According to the CRC Committee the right to legal or other appropriate assistance under art. 40 CRC is meant to assist the child in his defence and assist him emotionally during 'all (...) stages of the process, beginning with the interviewing (interrogation) of the child by the police' (GC No. 10, para. 52); see also para. 3.4.6.

²¹⁷ CAT Committee, 'Conclusions and recommendations: The Netherlands', CAT/C/NET/CO/4 of 3 August 2007, para. 6. In 2008 an experiment started on the presence of legal counsel during the initial police interrogations, but only (!) in cases of (alleged) homicide; *Parliamentary documents II* 2006/07, 30 800 VI, no. 86. See also the recommendations of the CPT regarding the Netherlands; CPT/Inf (2008) 2, para. 21. Cf Waals 2008.

the child is entitled to be assisted by his lawyer during the hearing preceding the order of remand in custody (pre-trial detention).

Based on article 37 (d) CRC each child deprived of his liberty under a court's disposition (i.e. youth imprisonment or treatment order) is (or remains) entitled to legal assistance. *De facto*, many lawyers terminate their activities as soon as the court's judgment becomes irrevocable. As will be addressed below, a child in a youth institution is entitled to legal assistance if he exercises his formal right to complain (art. 70 YCIA). This is, however, the only explicit reference to legal assistance that can be found in the YCIA, which is rather unfortunate since the child is entitled to assistance and, moreover, since the child can use (legal) assistance regarding other aspects of his institutional stay and its duration (see, e.g. para. 4.7 and earlier para. 4.3).

Under article 37 (d) CRC the child is additionally entitled to other appropriate assistance. According to article 490 CCP the child's parents (of legal guardians) are entitled to free access to their child, while he is in police custody. They have the same free access as the child's lawyer (art. 50 CCP). If the child is placed in a youth institution, the YCIA applies, which recognizes the parents as privileged visitors (see para. 4.8). These provisions give rise to the child's right to maintain contact with his family, one of the explicit rights of article 37 (c) CRC, but can also be regarded of significance for the implementation of article 37 (d) CRC.

Another form of additional assistance the Dutch CCP provides is 'pre-trial assistance' ('vroeghulp') by the Child Care and Protection Board. According to article 491 (1) CCP the board must be informed immediately after a child's remand in police custody has been ordered. 'Pre-trial assistance' implies that the board conducts a first preliminary assessment ('basisonderzoek') on the personal circumstances of the child, often resulting in a report that will be sent to the public prosecutor. The public prosecutor must take this report into consideration if he considers demanding the child's pre-trial detention (art. 491 (2) CCP). Often the Child Care and Protection Board uses the 'pre-trial assistance' to contact the child's parents and/or lawyer, and to make some practical arrangements. This specific juvenile justice assistance can be seen as a form of assistance under article 37 (d) CRC.

4.4.3 Right to Information on Reasons for Arrest and Prompt Information on Charges

The CCP explicitly instructs authorities to serve the orders to keep the child at the police station for further enquiries (art. 61 (6)), to place him in remand in police custody (art. 59 (2)) or to place him in pre-trial detention (art. 78 (2)). These orders must include information on the reasons and grounds for the child's deprivation of liberty. *De facto*, this information is presented in a very formal (traditional legal) manner. No explicit reference has been made to the fact that the information should

inform *children*, which requires another approach. These provisions do not safeguard that the child actually understands the information, taking into account his age or maturity, let alone that he can oversee the consequences. In this regard the right to legal and other appropriate assistance is of particular significance (again).

Although, there is no reason to believe that children under arrest or pre-trial detention are not well informed of the reasons for arrest or of the charges, the law does not provide for a child centred approach. This means that it very much depends on the authorities whether the information is clear, concrete and understandable for the child.

4.4.4 Right to Challenge the Legality of Deprivation of Liberty

Article 15 (2) of the Constitution embodies a limited right to challenge the legality of deprivation of liberty (hereinafter: right to challenge legality). It provides that anyone who is deprived of his liberty in another way than by a court order (for example by the police or public prosecutor) is entitled to demand his release before a court; the court is under the duty to hear the individual within a period of time set by law. If the court finds the deprivation of liberty unlawful, he must order the individual's release. This constitutional provision does in general equal the requirements of International Human Rights Law (see para. 3.4).

The first legal check provided by the CCP is when the child is brought before the public prosecutor forthwith after his arrest, that is within six (a maximum of fifteen) hours after his arrest (see para. 4.3). The public prosecutor can order the child's remand in custody for three days and, subsequently prolong it for another three days. The CCP, however, provides that the accused child must be brought before the examining judge within three days and fifteen hours after the arrest (art. 59a CCP). If the examining judge considers the police custody unlawful, he must order the child's immediate release. The CCP does not distinguish between children and adults in this regard and the period of three days and fifteen hours is longer than the period of 24 hours recommended by the CRC Committee (GC No. 10, para. 83). It is recommendable – and certainly defensible – to change the Code's standard and adopt a more child-oriented approach for child cases in particular (i.e. a shorter term than regarding adults preferably within 24 hours).²¹⁸

²¹⁸ Although, the 3 days and 15 hours term is a maximum term, the child has no right to submit a request for his release sooner. The child can request the termination of his remand in police custody during the hearing before the examining judge (art. 59a (4) CCP). Uit Beijerse criticizes the compulsory bringing before the examining judge, *inter alia* for being a 'formality', lacking the function as additional procedural safeguard. She suggests that it would have been better to provide the suspect in police custody with the right to challenge the legality of his police custody before the examining judge if and when he wants to; Uit Beijerse 2005, p. 974.

As described in paragraph 4.3, the examining judge can order the child's remand in custody (the first stage of pre-trial detention) for fourteen days. After this period the child is entitled to release, unless the public prosecutor demands the child's detention in custody before a special chamber of the district court. The court can order detention in custody for ninety days, but only if the child has been heard. Otherwise, the detention is limited in time by the law to a maximum of thirty days (art. 493 (4) CCP); one of the few child-specific provisions in this regard.²¹⁹ This implies that the first review is set by the CCP after 14 days. Subsequently, the CCP leaves room for longer periods of detention without interim review (30-90 days maximum) until the trial commences and makes hardly any distinction between children and adults. At this point the Code is not in conformity with the standards set by the CRC Committee, which recommended to guarantee the review of pre-trial detention 'regularly, preferably every two weeks', through strict legal provisions (GC No. 10, para. 83); and again an adjustment to the Code at this point for children is recommendable.²²⁰

Finally, the child can request the termination of his pre-trial detention (art. 69 CCP). He needs to be heard, but only at his first request.

Despite these tensions, the moments of review find their basis in statutory law and take place before a (juvenile) judge or court (see para. 4.3). Most decisions are made immediately, which fits the requirement of 'promptness', which according to the CRC should be made not later than two weeks after the challenge is made (GC No. 10, para. 83).

Furthermore, the right to challenge legality includes, according to the CRC Committee, the right to appeal. The Dutch juvenile justice system recognizes the child's right to appeal (see arts. 63 (4) and 71 CCP). In this regard, it is interesting to note that the child can once exercise his right to appeal regarding a detention order; he cannot appeal against a decision to prolong the detention if he already appealed the initial order (apparently without result) and the same is true regarding another prolongation. This would only be different if the facts are supplemented or the legal basis for detention has been changed (art. 71 (2) jo. 67b CCP). The child can also only once exercise his right to appeal against decisions regarding a request for suspension or termination of the pre-trial detention (art. 87 CCP). This rule is understandable for practical reasons, but one should be cautious that if the child submits a request for termination or suspension for the second (or third) time, based on new grounds or circumstances, this request should be taken seriously.

²¹⁹ Which could imply that children are advised by their lawyers not to appear before the court.

²²⁰ If one takes into account the fact that the law was changed in 2005 (Act of 10 November 2004, *Bulletin of Acts and Decrees* 2004, 578 (entry into force 1 January 2005) and that beforehand there was a review every thirty days, the law has worsened the legal status of the child.

In conclusion, the right to challenge the legality of deprivation of liberty is a right that must be invoked, but it is also strongly dependent on periodic review and appeal procedures. In 2007, the CRC Committee recommended the setting of fixed time limits and provided standards in this regard, which the Dutch CCP does not meet (yet). These recommendations deserve particular attention and legislative change, which is primarily prompted by the absence of a clear child centred approach in the CCP. Finally, legal and other appropriate assistance to each child deprived of his liberty is of particular significance for the realization of the right to challenge legality. Although this seems to be recognized to a large extent, the period between arrest and remand in police custody seems to be a weak link, since neither law nor practice provide for adequate incentives to guarantee legal and other appropriate assistance.

4.4.5 Right to Compensation

International Human Rights Law provides for the right to compensation as a remedy for unlawful deprivation of liberty (art. 9 (5) ICCPR; art. 5 (4) ECHR). The Dutch CCP provides for compensation if the child has suffered (financial) damage from pre-trial detention, in the event the case has ended without disposition or without disposition for a crime regarding which pre-trial detention is allowed (art. 89 CCP).²²¹ The amount of compensation is to be determined equitably. A person who has spent time in pre-trial detention and is acquitted later, does not necessarily have a right to compensation. This depends on the lawfulness of the pre-trial detention (i.e. grounded on a reasonable suspicion of having committed a crime); an approach which fits the one present under for example article 9 (5) ICCPR (see para. 3.4.6).

The Criminal Court of Appeal of The Hague found in 2000 that children could be rewarded with less compensation due to the fact that children because of their 'age and social position' suffer 'very limited material damage as a result of the pre-trial detention'.²²² A rather curious reasoning; it is not hard to defend the opposite, implicitly supported by International Human Rights Law (see, e.g. art. 9 (5) jo. 24 ICCPR).

4.4.6 Conclusion

The legal safeguards addressed in this paragraph are entitlements for children (and others) deprived of their liberty and are linked to the special condition they are in. They are of particular significance to safeguarding lawful and non-arbitrary deprivation of liberty, including the use of arrest, detention and imprisonment as a

²²¹ According to art. 591a CCP the child can demand compensation for the costs he had to make for his legal representation, if he had any.

²²² Criminal Court of Appeal of The Hague, 20 January 2000, *NJ* 2000, 267; De Jonge & Van der Linden 2004, p. 153.

measure of last resort and for the shortest appropriate period of time. However, the right to legal and other appropriate assistance is also of great significance for the child's legal status, during his deprived liberty, both in the pre-trial and in the post-disposition phase.

Dutch law in general guarantees the different legal guarantees provided under International Human Rights Law, although they cannot be regarded as child-specific. Despite some deviations, the CCP is applicable to both adults and children, but lacks a clear child orientation (*cf* the conclusions of para. 4.3). Hardly any significant distinction is made between the approach towards children and adults. For example, the CCP does provide that each child in police custody must be brought before the examining judge within three days and fifteen hours after his arrest, but does not differentiate between children and adults, while the CRC Committee recommends a term of 24 hours before a child must be brought before the competent authority to review the legality of his deprivation of liberty. In addition, the CRC Committee recommends a periodic review of pre-trial detention of children every two weeks, which does not correspond with the term for detention in custody of both children and adults – ninety days without interim review. The child is to some extent specifically protected, through the limitation of the maximum term to thirty days in the event that he has not been heard by the court (*de facto* resulting in a review after thirty days and prolongation to sixty or ninety days if necessary, and (potentially) fostering lawyers to advise their clients not to appear before the court). However, the general conclusion is justified that the CCP again has not adequately recognized the specific position of the child. Another issue of concern is the fact that during the (first) police interrogations the child is not provided with the legal (or other appropriate) assistance – a practice condoned by the Netherlands Supreme Court. Recently, a pilot has started in which the accused child (or adult) is provided with the *presence* of legal counsel during the first police interrogations. Unfortunately, this pilot is limited to cases of alleged homicide only.

Despite these critical remarks, Dutch law provides relevant legal safeguards and in particular the specific role of the Child Care and Protection Board is an interesting example of 'other appropriate assistance' granted to each child in police custody. Legal assistance is furthermore, to a large extent, dependent on the dedication of the lawyers and their profession, and should certainly not be limited to police custody and pre-trial detention. Lawyers are also needed to assist children during the post-disposition phase.

4.5 DUTCH LEGAL PROVISIONS REGARDING THE TREATMENT OF CHILDREN DEPRIVED OF THEIR LIBERTY; SOME GENERAL OBSERVATIONS AND REMARKS

4.5.1 Introduction

As mentioned in the introduction of this chapter (para. 4.1), in September 2001 the Dutch legislator introduced a law specifically designed for children in youth institutions, the Youth Custodial Institutions Act (YCIA) – a statutory law primarily meant to strengthen the legal status of children. The YCIA is particularly interesting in light of the recommendation of the CRC Committee to implement the JDLs (in conjunction with the SMR) and to incorporate them into national laws and regulations (GC No. 10, para. 88). The legal implications of this domestic statutory law and the related legal framework will be addressed in this and the following paragraphs, basically according to the pattern of para. 3.5ff.

Before discussing the implications in detail (see para. 4.6ff) this paragraph addresses some of the key characteristics of the legal status of individuals, in particular children deprived of their liberty in the Netherlands. Although this study mainly focuses on children in youth institutions, this paragraph will too some extent address the legal position of children in police custody.

4.5.2 Dutch Legislation concerning Children Deprived of Their Liberty: Some General Observations

4.5.2.1 Dutch Constitution

Article 1 of the Constitution prohibits discrimination on any ground (*cf* art. 2 CRC). According to article 15 (4) of the Constitution, each individual deprived of his liberty can be limited in the exercise of his fundamental rights as far as this enjoyment is not compatible with the objectives of the deprivation of liberty. This formulation seems to represent the ‘doctrine of the inherent limitations’, which would be on strained terms with International Human Rights Law implying that everyone deprived of liberty remains in principle entitled to all human rights and fundamental freedoms (see para. 3.5). Kelk, however, doubts whether this approach really represents the Constitution’s objective.²²³ This is a view that was confirmed by the Minister of Justice’s remarks during the parliamentary debate of the YCIA, particularly regarding the provisions concerning limitations of the rights and freedoms of children deprived of their liberty. The Minister argued that article 15 (4) of the Constitution on the one hand leaves some room for policy making for the administration of institutions; on the other it demands that limitations may only be

²²³ Kelk 2003, p. 22.

imposed if required by the deprivation of liberty.²²⁴ As specifications of article 15 (4) of the Constitution, the Minister included explicit provisions regarding limitations of the rights of children in youth institutions in the YCIA (see art. 2 (4) YCIA). This approach has been referred to as the ‘doctrine of minimal limitations’²²⁵, that is: limitations of the enjoyment of human rights of children deprived of their liberty should be reduced to the absolute minimum and may only be imposed if required by the objectives of deprivation of liberty.²²⁶

4.5.2.2 Code of Criminal Procedure and Children in Police Custody

Regarding individuals (adults or children) held in remand in police custody, article 62 (1) CCP provides that a suspect held on remand in police custody may not be subjected to limitations other than those that are absolutely necessary in the interests of the criminal investigation or in the interests of order. This provision represents the doctrine that each individual in police custody remains in principle entitled to all human rights and fundamental freedoms. According to article 62 (2) CCP limitations required by the criminal investigation can be imposed on the basis of an order by either the examining judge or the (assistant) public prosecutor (art. 62a CCP) and can limit visits, telephone calls, correspondence by mail, access to newspapers, reading materials or other data carriers, or imply other measures affecting the child’s deprivation of liberty. The measures can also lead to the suspect’s transfer to a hospital or other facility where medical supervision can be guaranteed or to a police cell where medical supervision can be exercised. The suspect has the right to file objections against such measure before court (art. 62a (4) CCP), which suspends it, unless its immediate enforcement is found absolutely necessary by the ordering authority.

Free access of a lawyer to his client (art. 50 CCP), and subsequently of parents and their child (art. 490 jo. 50 CCP), can be limited, but only if there is a serious suspicion that free access will provide the child with information that he had better not receive in the interests of the criminal investigation or that it will be used to interfere negatively with the interests of establishing the truth (art. 50 (2) CCP).²²⁷ The examining judge or public prosecutor must order the limitation and must specify at each occasion the nature of the limitation, which can vary from denial of access,

²²⁴ Explanatory Memorandum YCIA, p. 6.

²²⁵ Kelk 2004, p. 270.

²²⁶ Explanatory Memorandum YCIA, p. 16. This also implies that it requires individual decisions based on the specific circumstances of the case.

²²⁷ The Code is silent regarding the specific position the child’s parents based on art. 490 jo. 50 CCP, while in conformity with art. 37 (c) CRC it is defensible that the child’s best interest legitimizes limitation of parental access to the child, as an additional ground to the ones provided by art. 50 CCP.

merely denial of conversation or denial of the delivery of written correspondence. The CCP explicitly provides that the order must specify the reasons for the limitation and stipulates that limitations must not last longer than strictly required by the circumstances and by no means longer than six days. Furthermore, the examining judge and the public prosecutor must immediately bring the order before a (special chamber of the) court, which will hear the lawyer and examine the order in light of the above mentioned requirements. In addition, the child will be appointed another lawyer (art. 50a CCP). If the child's parents are denied access the child's lawyer could serve as an intermediate between the child and his parents.

De Jonge & Van der Linden observe that despite article 61 (1) CCP, police custody *de facto* results in a number of limitations, the legitimacy of which often is not clear and that the police use a system in which individuals can earn privileges, such as smoking, reading materials or contact with family.²²⁸ This can hardly be regarded as a practice in conformity with International Human Rights Law. Moreover, neither in the CCP, nor in practice specific reference is made to children. In general, article 218ff Act Implementing the CCP ('Invoeringswet')²²⁹ provides that places for police custody must meet the requirements of a 'simple but adequate day and night center', without providing any further guidance. During police custody men and women should be separated as much as possible and individuals placed together in police custody should preferably be separated during night. Article 221 Act Implementing the CCP provides that specific provisions could be made regarding children in police custody, but this has not resulted in special rules for the treatment of children in police custody.²³⁰

As mentioned before the duration of stay of children in police custody is limited in time by law. Children are released afterwards or subsequently detained in a youth institution. As soon as they are placed in a youth institution they fall under the scope of the YCIA.²³¹

²²⁸ De Jonge & Van der Linden 2004, p. 139.

²²⁹ Act of 29 June 1925, *Bulletin of Acts and Decrees* 1925, 308. Cf De Jonge & Van der Linden 2004, p. 139.

²³⁰ Art. 27 of the Official Instructions for the Police, the Royal Military Constabulary and Special Investigating Officers ('Ambtsinstructie voor de politie, marechaussee en buitengewone opsporingsambtenaren') provides that regarding a child the police should inform the child's family on its own initiative. This instruction may be set aside in the interest of the criminal investigation; cf Heide-Jørgensen, Jeldes & Groenendaal 2007. There has hardly been any (legal) research regarding children in police custody; one study dates from 1988: Defence for Children International 1988.

²³¹ Note that the placement procedure, which starts after the examining judge or court has ordered the child's detention, is also regulated by the YCIA (see art. 16ff YCIA and para. 4.7.2). If a child is held at the police station under art. 16a YCIA (see para. 4.3) he does not fall under the protection of the YCIA. Furthermore, the limitations under art. 62 CCP can also be imposed on a child in pre-trial detention and interfere with the provisions of the YCIA.

4.5.2.3 Youth Custodial Institutions Act

The YCIA entered into force on 1 September 2001. It was drawn up as a framework Act on the execution of deprivation of liberty in Dutch youth institutions, which also is its primary limitation in scope.²³² The most important objective of the YCIA was to *strengthen* the legal status of children in youth institutions. To this end, the YCIA contains clearly defined and verifiable rights and duties.²³³ The rights and duties concern the most important objectives of the deprivation of liberty (and thus the functions of a youth institution): security, upbringing and (social) rehabilitation (art. 2 (2) YCIA). Treatment can be an objective, too. Based on these objectives the rights and freedoms of children can be restricted. Restrictions can also be imposed if required for the order or safety in the institution. Restrictions on other grounds are not allowed and lead to violation of the child's legal status (art. 2 (4) YCIA).

The YCIA provides minimum rules with regard to placement, replacement, to register a complaint against placement and the possibility to request for (re)placement (e.g. in the vicinity of the family). It also entails provisions with regard to (obligatory) education, upbringing and (personal and health) care and provisions for leave arrangements, contact with family through correspondence, telephone and visits, and contact with the mass media. Furthermore, the YCIA embodies rules regarding a specific reintegration programme: the School and Training Programme (STP).

The YCIA prescribes in detail on what grounds and by whom the child's rights, such as the freedom of movement or right to privacy, may be restricted. In essence these restrictions must be based on the objectives of the deprivation of liberty as mentioned before (security, upbringing, rehabilitation and treatment). Furthermore, these restrictions may generally be imposed by the director of the institution only, after hearing the child and providing him with a written copy of the decision. The most far-reaching forms of restrictions are regulated by the YCIA, such as inspection and screening, use of force, measures to restore the order or safety in the institution or to protect the child and disciplinary sanctions.

Every youth institution must have its own independent supervisory committee ('commissie van toezicht') that can visit the institution at any time and should do this at least twice a month. The YCIA also provides for the right to file a complaint against individual decisions made by, or on behalf of, the administration of the institution. The independent complaints committee of the supervisory committee

232 It is not applicable to police cells or other institutions that do not fall under the responsibility of the Ministry of Justice, such as borstals (e.g. Glen Mills School) or the new established facilities for closed youth care.

233 In addition, the legislator ended the various and diverse legislation and regulations by creating one statutory law embodying all relevant procedural and substantive provisions. In addition, legislation was supplemented with provisions, filling the lacunae.

hears the complaints. Its decisions can be appealed before the Appeals Committee of the Council (Appeals Committee). Furthermore, the YCIA provides for the right to an interpreter and the right of (legal) assistance (see para. 4.9).

The YCIA is a framework act that contains minimum provisions that are further elaborated in the Youth Custodial Institutions Regulation (YCIR)²³⁴, a lower (non-statutory) governmental decree (order in council; ‘algemene maatregel van bestuur’). Together they provide a comprehensive set of regulations regarding various aspects of placement of children in and the organization of youth institutions.²³⁵ In addition, the Ministry of Justice has drawn up sixteen (non-statutory) ministerial regulations,²³⁶ which provide for further (and lower) rules regarding the enforcement of the regulations of the YCIR and YCIA.²³⁷ Altogether, the legislator (and executive power) has created a detailed but sometimes inscrutable set of regulations, which can be rather complex (see below). This complexity is furthermore increased by the fact that each youth institution has to draw up internal rules according to a model (provided in one of the sixteen ministerial regulations; see para. 4.7), which reflects the rules set in the YCIA framework, but translated and adjusted to local realities (art. 4 (1) YCIA).

4.5.3 Evaluation of the YCIA

The evaluation of the YCIA, conducted in 2003 and 2004, concluded that in general the YCIA is working reasonably well and that it has improved the legal status of the children in youth institutions.²³⁸ The legislation is rather clear and the accessibility of the rules and provisions has improved. Furthermore, staff members of institutions have become more aware of the child’s legal status. Some respondents have argued that more attention should be paid to the children’s duties and some have found that the law has legalized institutional life too much. However, there is a broad

²³⁴ Decree of 5 July 2001, *Bulletin of Acts and Decrees* 2001, 350.

²³⁵ The main difference between the YCIA and YCIR is that the former is a statutory law adopted by the government and parliament (art. 81ff of the Constitution). A statutory law enters into force after publication in the Bulletin of Acts and Decrees. Provisions of statutory law have the strongest democratic foundation and contribute to legal equality, certainty and continuity. It can delegate elaboration of its provisions to a (lower) governmental decree adopted by the government in a Royal Decree, without parliamentary approval. It also enters into force after publication in the Bulletin of Acts and Decrees, but it can be changed more easily since it does not require a parliamentary debate.

²³⁶ These are policy regulations ordered by the Minister of Justice and are published in the Government Gazette.

²³⁷ The different regulations will be addressed below, where relevant. Moreover, there is an unknown number of circulaire’s and other policy documents.

²³⁸ YCIA Evaluation 2004, p. 192.

consensus of the importance of a good legal status for children in youth institutions. In addition, the legal status can be realized and guaranteed in daily practice.²³⁹

Most of the directors felt that the YCIA is a workable instrument, a conclusion that was not broadly supported by the unit leaders. The main issue seems to be that the YCIA leaves too little room for the pedagogical work that is (and has been) characteristic for the youth institutions. In particular, the group leaders have fewer competences than before and must seek the director's assistance more often in order to take certain measures, in particular restrictive measures. This is accompanied by an increase in administrative tasks. On the other hand one of the benefits of the YCIA is that it has diverted some competences from the staff members (in particular the group leaders) to the director of the institution, in order to foster objectivity and ultimately the prevention of arbitrary treatment. The YCIA in this regard also contributed to more clarity for both staff as well as the administration regarding competences. Still, some of the rules are rather rigid. The rigidity was particularly visible regarding the fixed number of hours that children must stay in groups (set by the YCIA), which caused conflicts of an organizational nature and was particularly problematic regarding children with serious mental or behavioural problems.²⁴⁰ In addition, it turned out that the implementation of the YCIA was problematic regarding in (semi-)open youth institutions. One of the questions raised was to what extent the YCIA remains applicable if children in such institutions go to a community school.²⁴¹

The main general conclusion of the YCIA Evaluation is that there seems to be a conflict between the desire for clear rules and clarity on the one hand and sufficient room for appropriate pedagogical work and treatment on the other. Coping with this potential conflict requires certain skills that can vary from one staff member to another. This conflict should receive special and constant attention. The above mentioned skills could be developed or improved through training and courses for the (new) staff.²⁴²

One of the biggest problems of the YCIA is that it applies to institutions which were originally based on a child welfare approach, but in which the children's legal status increasingly gained significance (see para. 4.1). The roots and culture of Dutch youth institutions make that primary attention has been given to the child's welfare, regardless of the reason for institutional placement (i.e. under juvenile criminal law

²³⁹ YCIA Evaluation 2004, p. 190. Although, this is not free from challenges; see further below. Cf the 2007 reports of the National Inspectorates and Netherlands Court of Audit (para. 4.1).

²⁴⁰ Regarding these children YCIA was changed later, resulting in the introduction of arts. 22a and 22b YCIA, which allows the placement of these children in departments of intensive care or supervision with an adapted daily programme (Act of 4 December 2003, *Bulletin of Acts and Decrees* 2003, 499).

²⁴¹ YCIA Evaluation 2004, p. 187-188.

²⁴² *Ibid.*, p 188 and 193. See also in para. 4.10. The YCIA Evaluation concluded that this conflict of interests should be the subject of further research.

or child protection law; see further para. 4.6). Attention for the child as holder of rights has been growing since the 1960s and 1970s. In addition, the child's capacities and responsibilities gained attention as well. The adoption of the YCIA in 2001 was the recognition by law of the child as individual rights holder and had large impact on the culture of daily institutional life. Despite the positive general conclusions mentioned above, staff (unit leaders and group workers) experience the strong emphasis on the legal position of the child to be a barrier to their pedagogical tasks. They are not squarely against it, but in their experience the emphasis on the legal status of the child can frustrate, infringe or limit the process of upbringing and reintegration (e.g. by (frequently) filing complaints).²⁴³ This had also something to do with the fact that the YCIA explicitly made the director of the institution responsible for decisions with regard to restrictions of the civil rights of children.

Furthermore the YCIA is a complex legal instrument (due to the comprehensive (additional) set of rules and the legal structure as described in para. 4.5.2) and because of that, group workers felt that they had to become part-time lawyers. One of the big lessons learned is the vast importance of educating (in a broad sense) all the staff involved as legislation enters into force and during its operation.²⁴⁴

In line with this, a legal instrument like the YCIA can be ineffective because children are not aware of their legal position. Informing children of the applicable legislation and its implications is essential as well. Although the YCIA provides that each child should be informed about his rights when he enters the institution, the Evaluation showed that children increasingly become aware of their rights during their stay in the institution and that their awareness cannot be attributed to activities of the institution. In general, the children themselves found a strong legal position of great importance (see for more on this para. 4.7.4).²⁴⁵

Finally, a legal instrument like the YCIA cannot work (or can be very much ineffective) without sufficient resources and (political) will to implement it. One of the general recommendations of the YCIA Evaluation concentrated on implementation. The introduction of extensive new legislation, such as the YCIA, requires, besides education of everyone involved, sufficient and appropriate financial support, in particular for the implementation of newly established elements, such as reintegration programmes and cooperation between the relevant authorities and institutions (see para. 4.11). The YCIA Evaluation revealed that it seems that the legislator and executive power have not fully taken their responsibility in this regard.²⁴⁶

²⁴³ Cf e.g. Liefwaard 2004.

²⁴⁴ YCIA Evaluation 2004, p. 193.

²⁴⁵ *Ibid.*, p. 131ff.

²⁴⁶ *Ibid.*, p. 193.

4.5.4 Compliance of the YCIA with International Human Rights Law and Standards: Some General Remarks

4.5.4.1 YCIA's Framework of Reference: an International Human Rights Approach?

Before assessing the implications of the YCIA in detail (see para. 4.6ff) a few general remarks will be made regarding the relation between the YCIA and International Human Rights Law and Standards. One of the key questions of this study is whether the Dutch legislative reforms, leading to the YCIA, have resulted in legislation that guarantees every child deprived of liberty (i.e. placed in youth institutions) treatment in accordance with International Human Rights Law, in particular with article 37 (c) CRC. Given the legislator's objective to strengthen the legal status of children deprived of liberty and the general conclusion of the Evaluation that he has managed to do so, implies that the answer to this question could be positive. However, questions remain such as: What is meant by a stronger legal status? And which framework of reference has been used by the legislator to determine the content of the legal status?

From the Explanatory Memorandum it is clear that the Dutch legislator has used international human rights as a framework of reference. The legislator explicitly referred to the ICCPR, ECHR and CRC as the hard international law instruments that – partly²⁴⁷ – determined the structure and content of the legislative proposal of the YCIA. In addition, reference was made to the European Prison Rules, UN Body of Principles, Beijing Rules and JDLs, as guidelines.²⁴⁸ No reference has been made to the SMR or CPT standards. The legislator elaborated further on the content of article 10 ICCPR, which according to his view sets higher standards in programmatic terms ('taakstellender karakter'), than article 3 ECHR and article 37 CRC's prohibition of torture and other forms of inhuman or degrading treatment.²⁴⁹ The Explanatory Memorandum explicitly refers to those CRC provisions the legislator found of particular relevance for children in youth institutions, namely articles 12 (participation), 16 (privacy), 19 (protection against abuse and neglect), 20 (alternative care), 25 (periodic review), 37 (prohibition of torture and ill-treatment; deprivation of liberty of children) and 40 (objectives of juvenile justice).²⁵⁰

²⁴⁷ The YCIA has been drafted according to two similar principle acts for adults: the Penitentiary Principles Act for prisoners and the Principles Act for Persons under a treatment order. Altogether these acts formed part of an integral review of legislation for prisoners and detainees in the Netherlands. The YCIA Evaluation revealed that some found that the YCIA was drafted too much according the adults acts and consequently lacked child-specificity.

²⁴⁸ Explanatory Memorandum YCIA, p. 8-9.

²⁴⁹ *Ibid.*, p. 9. The legislator does not refer to article 37 (c) CRC in this regard.

²⁵⁰ *Ibid.*, p. 9. The legislator also points to the Dutch reservations made to both art. 10 ICCPR and art. 37 (c) CRC regarding the requirement of separation of children from adults; *cf* para. 4.6.

Specific reference to the CRC has furthermore been made occasionally. Article 19 CRC for example has been referred to in light of the general task of youth institutions as caretaker of the child, which includes that the child must be protected against ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’ during his stay in the institution.²⁵¹ Article 16 CRC has been explicitly mentioned as the key provision with regard to legitimating further limitations of child’s human rights and freedoms during his deprivation of liberty (*cf* art. 2 (4) YCIA).²⁵² Articles 9 and 37 (c) CRC have been mentioned explicitly with regard to the child’s right to maintain contact with his parents and the wider community under the YCIA.²⁵³ Furthermore, explicit reference has been made to articles 28 and 29 CRC as the basis for the obligation to provide for education and for the child’s participation in this regard.²⁵⁴ Finally, article 40 CRC has been used as a point of reference in the Explanatory Memorandum to the YCIR concerning the creation of the STP.²⁵⁵

Articles 6 ECHR has been mentioned explicitly regarding the provisions regarding the complaints procedure.²⁵⁶ Rule 11 (2) of the 1987 EPR has been mentioned as the basis for joint housing of boys and girls in treatment centres.²⁵⁷

Despite these references to the international human rights framework, the legislator’s efforts have not been abundant in this regard. Reference to International Human Rights Law and Standards is primarily limited to the legally binding provisions and it is not specific enough, that is: the legislator has not elaborated on the question what International Human Rights Standards mean for the provisions in the YCIA. As a consequence, it remains for example unclear whether the absence of certain references or specificity implies that the legislator considers these as legally binding and directly applicable. This is particularly true for article 37 (c) CRC’s requirement that each child must be treated with humanity, with respect for his inherent dignity and in a manner that takes into account the child’s needs and for article 37 (a) CRC’s prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment (see below).

One may expect based on the (general and occasionally specific) references to International Human Rights Law and Standards that the Dutch legislator felt the obligation to take this framework seriously and implement it, which does, however, not necessarily imply that the law is in full accordance with its provisions.

²⁵¹ Explanatory Memorandum YCIA, p. 16.

²⁵² *Ibid.*, p. 16-17.

²⁵³ *Ibid.*, p. 52-53. Although the legislator refers mistakenly to art. 37 (d) CRC.

²⁵⁴ *Ibid.*, p. 59.

²⁵⁵ Explanatory Memorandum YCIR, p. 33.

²⁵⁶ Explanatory Memorandum YCIA, p. 71-72; Art. 8 ECHR is mentioned in light of the placement of an infant with his or her mother or father; see p. 75.

²⁵⁷ *Ibid.*, p. 31. *Cf* rules 18.8 and 18.9 of the 2006 EPR.

4.5.4.2 Is Article 37 (c) CRC's Quality of Treatment Incorporated into the YCIA?

The YCIA does not contain an explicit provision calling for treatment with humanity or with respect for the inherent dignity of the child. However, each child in a youth institution remains entitled to all rights under International Human Rights Law unless their enjoyment should be limited for the realization of the objectives of the child's stay in the institution or for reasons of order or safety (art. 2 (4) YCIA). Treatment in a manner that takes into account the needs of children could be regarded as covered by the fact that YCIA is an Act specifically designed for children in youth institutions, including provisions regarding education with upbringing as one of the main objectives of the institutional stay (art. 2 (2) YCIA).²⁵⁸

It is remarkable and worth mentioning that article 24 YCIR elaborates on the responsibilities of both remand homes and treatment centres, stating that both kinds of youth institution are responsible for safeguarding a safe and secure environment and treatment with humanity for children inside. One would expect that this would have been adopted in the YCIA.

In addition, they must contribute to the improvement of the child's social functioning through an educational programme and individual (treatment) plan and they must foster the continuity of the judicial process.²⁵⁹ Finally, the objective of a child's stay in either a remand home or treatment centre is to reduce the chance that the child recommits offences after his return to society (*cf* art. 40 (1) CRC; see para. 4.11).

4.5.4.3 Is the Prohibition of Torture and Other Ill-treatment Incorporated into Dutch law?

Article 11 of the Constitution stipulates everyone's right to physical integrity. The Constitution does not contain an (explicit) prohibition of torture or other forms of cruel, inhuman or degrading treatment or punishment. The lack of such a provision is not a problem given the fact that this prohibition forms part of International Customary Law. However, it can be regarded as a regrettable omission that the Dutch Constitution does not explicitly reject these forms of heinous treatment or punishment, where it does for instance prohibit the death penalty (art. 114 Constitution).

The 2003 International Crime Act²⁶⁰ ('Wet internationale misdrijven') prohibits torture committed outside the Netherlands in a humanitarian context. This Act

²⁵⁸ Although the child-specificity has been criticized by some during the YCIA Evaluation; see para. 4.5.5.

²⁵⁹ The implementation of these points of departure have been criticized in the recent reports of the National Inspectorates and Netherlands Court of Audit; see para. 4.1.

²⁶⁰ Act of 19 June 2003, *Bulletin of Acts and Decrees* 2003, 270.

provides for a definition of torture, which links up with the CAT definition, which has been greeted with approval by the CAT Committee.²⁶¹

The prohibition of other forms of cruel, inhuman or degrading treatment or punishment has neither been adopted in Dutch legislation, nor have these forms been defined. However, these forms of treatment or punishment will fall under criminal acts embodied in the CrimCo, such as deliberate aggravated assault with bodily harm ('zware mishandeling met voorbedachte rade'; art. 303 CrimCo).

Regarding children in particular it is interesting to note that the Dutch legislator adopted a prohibition of physical and mental violence or any other degrading treatment 'for educational purposes', including in the family environment in 2007 (article 1:247 Civil Code).²⁶² By implication one could argue that others in charge with the care and upbringing of a child (i.e. a youth institution) should refrain from such treatment or punishment as well.

Finally, the YCIA does not explicitly include the prohibition of torture or other forms of cruel, inhuman or degrading treatment or punishment either.²⁶³ The legislator has recognized article 37 CRC and article 3 ECHR as relevant provisions of International Human Rights Law for the YCIA and children deprived of their liberty in youth institutions, but it has not explicitly adopted a similar provision in the YCIA. Due to the absence of any clarification it remains unclear whether the legislator found no reason to do so, for example due to its direct applicability – or maybe torture or other ill-treatment is not considered an issue in the Netherlands (see also below).

Based on the specificity of the rules regarding the imposition of the measures of an order or disciplinary sanctions and the use of restraint and force, it is likely that the legislator aimed at granting children protection against the prohibited forms of heinous treatment or punishment.

One could assume that torture does not occur in the Netherlands. To draw a similar conclusion with regard to cruel, inhuman or degrading treatment or punishment is rather difficult. The constitution of these forms of ill-treatment is mainly dependent on the specific circumstances of the case and it is difficult to make assumptions in

261 CAT Committee, 'Conclusions and recommendations: The Netherlands', CAT/C/NET/CO/4 of 3 August 2007, para. 3 (a).

262 Act of 8 March 2007, *Bulletin of Acts and Decrees* 2007, 145 (entry into force 25 April 2007); again noted with approval by the CAT Committee, 'Conclusions and recommendations: The Netherlands', CAT/C/NET/CO/4 of 3 August 2007, para. 3 (b).

263 However, e.g. corporal punishment is prohibited, because it has not been adopted in the exhaustive list of permitted disciplinary sanctions (see para. 4.9)

this regard (see para. 3.6). In general, one cannot exclude that these forms of treatment or punishment occur.²⁶⁴

Issues under article 37 (a) CRC (in conjunction with article 19 CRC) are sometimes raised before Dutch courts, but this has not yet resulted in a judgment that this provision has been violated. In a case before the District Court of Utrecht a child raised issues regarding the treatment inside the Glen Mills School, a borstal. The court ruled that a regime of a borstal ('jeugdinternaat'), which includes a disciplinary system in which physical and mental pressure is exercised over the child, entails the risk of violating international human rights norms included in the CRC, but does necessarily violate these norms. Violation can be assumed if the child is treated in way that constitutes child abuse, which could be defined as 'each form of interaction, threatening or violent towards the child, of physical, mental or sexual nature, which educators impose, actively or passively, on the dependent child, through which the child is seriously damaged, resulting in either physical damage or mental disturbances'.²⁶⁵ In this case the court had no reason to assume article 37 (a) CRC, which could be regarded as directly applicable, had been violated.²⁶⁶

4.5.5 Conclusion

This paragraph served as a general introduction to the more detailed discussion of the YCIA and its implications in the following paragraphs. In general the YCIA can be seen as a statutory law with a proven potential to strengthen the child's legal status during his deprivation of liberty. It is founded on the 'doctrine of minimal limitations' witnessed in detailed provisions regarding further limitations of human rights and fundamental freedoms, but also contains substantive minimum provisions setting a child orientated and humane climate. The YCIA's implementation has not been without problems, but in general the conclusion is justified that it is working reasonably well. In addition, it can certainly contribute to a climate, which fosters the child's treatment in accordance with International Human Rights Law, in particular with article 37 CRC. In this regard a few critical concluding remarks should be made.

²⁶⁴ The 2007 reports of the National Inspectorates give – as a minimum – reason to be particularly cautious, since in general youth institutions seem not capable of guaranteeing the safe climate they ought to guarantee; see para. 4.1. The CPT found no evidence of ill-treatment, based on its visit to one youth institution (and a number of adult facilities) in June 2007; CPT/inf (2008), 2, para. 77.

²⁶⁵ In Dutch: 'Kindermishandeling is elke vorm van voor het kind bedreigende en gewelddadige interactie van fysieke, psychische of seksuele aard, die de opvoeders van het kind in de afhankelijkheidsrelatie, actief of passief, opdringen, waardoor ernstige schade wordt berokkend aan het kind in de vorm van fysiek letsel en/of psychische stoornissen'. This definition is generally accepted by the government and is also used by the Child Abuse Counselling and Reporting Centres ('Advies- en Meldpunten Kindermishandeling').

²⁶⁶ District Court of Utrecht, 29 October 2007, No. 236431 / JE RK 07-1746 (LJN: BB8303).

First, the scope of the YCIA is limited to youth institutions only. Although this covers a significant part of children deprived of their liberty, it does not cover police cells or related institutions that do not fall under the direct responsibility of the Ministry of Justice, for example borstals (e.g. Glen Mills School) or the new facilities for closed youth care, in which children are also deprived of their liberty. The applicable legislation regarding borstals is rather unclear; institutions for closed youth care are governed by the Youth Care Act (changed on 1 January 2008; see para. 4.1). Police custody is primarily covered by the CCP, and based on the doctrine of minimal limitations, but its practice can hardly be regarded as child's rights based. This omission has become increasingly relevant, since a child in pre-trial detention can be held at the police station under certain conditions for some time, instead of transferring him immediately to a youth institution (art. 16a YCIA; see para. 4.3 and 4.7). Dutch law does not provide any justification for these different approaches. It is highly recommendable to adjust the law in this regard and make either the CCP more child-specific or make the YCIA (partly) directly applicable for children in police custody, which implies that the regime in police stations should be in accordance with the YCIA.

Second: although explicit reference has been made to the relevant international human rights instrument, in particular to the ICCPR, ECHR and CRC, the adoption of the YCIA was certainly not prompted solely by the desire to implement international law. There were other motives, such as to complete a full legislative coverage of all forms of deprivation of liberty within the criminal justice system by separate laws for adult prisons and detention centres, for (closed) treatment centres for adults and one for youth institutions. In this regard an important point of critique should be mentioned, namely that the YCIA to some extent cannot be regarded as child-specific; it would have been drawn up too much according to its adult predecessors. Even though this critique is not completely unfounded (which will be highlighted occasionally below) and seems to be related to its rigidity and comprehensiveness, one could at the same time argue that this provides the ultimate recognition of the child as holder of rights (and no longer merely as an object of the pedagogical programme of the institution). More importantly the YCIA certainly cannot be regarded as inappropriate for children; it explicitly provides for upbringing one of the key objectives of the child's stay in the institution; it provides for compulsory educational and has explicitly recognized the position of parents. The YCIA is founded upon the idea that each child deprived of his liberty in a youth institution is entitled to the same level of (legal) protection as adults. At the same time the institution has the obligation to provide a climate which meets the needs of the child as a human being in development. It should foster the ideal balance between attention for the child's legal status, meant to safeguard his rights and freedoms, and the realization of a pedagogical climate. This furthermore should be regarded as the primary challenge of everyone working in and around the institutions.

4.6 SEPARATION ISSUES

4.6.1 Introduction

Under International Human Rights Law two issues of separation of different categories of individuals deprived of liberty can be clearly recognized, namely separation of children from adults, one of the oldest UN principles in criminal justice (art. 10 (2) (b) and (3) ICCPR; art. 37 (c) CRC; see para. 3.7) and separation of unconvicted and convicted individuals (adults or children) deprived of liberty (art. 10 (2) (a) ICCPR). As elaborated in paragraph 3.7 there are two other issues of separation that deserve special attention. The first one is separation of children in accordance with their age, maturity and special needs, which has for example implications for the housing of boys and girls. The second issue of separation (or non-separation) affects children deprived of their liberty for different reasons and on different (legal) grounds; in the Netherlands this issue is primarily concentrated on the mixing of children in youth institutions under the child protection and juvenile justice system ('samenplaatsing'). Although strictly it goes beyond the scope of this study to address children placed in institutions under child protection law, this (mixing) issue has played a significant role in the Netherlands and recently led to a significant change in policy and legislation (see also para. 4.1). Therefore it will be addressed below in para. 4.6.5.

4.6.2 Separation of Children from Adults

4.6.2.1 Separate Youth Institutions; Placement in Adult Facilities Not Excluded

In the Dutch legal system there have been separate youth institutions since the entry into force of the three Child Acts in 1905 (see para. 4.1). As highlighted earlier youth institutions are meant for children deprived of their liberty on different legal grounds (art. 9 and 10 YCIA). Adult facilities are in principle not meant for children. However, there are some explicit exceptions regarding young adults tried under the juvenile justice system (see para. 4.6.2.2) and children sentenced under adult penal law (para. 4.6.2.3). Moreover, there is no explicit statutory provision prohibiting children under the juvenile justice system from being placed in adult facilities. Nor is there any statutory provision stipulating that pre-trial detention, youth imprisonment or a juvenile justice treatment order must be executed in a youth institution.²⁶⁷

On the contrary, as mentioned in paragraph 4.3 pre-trial detention of children can be enforced anywhere (art. 493 (3) CCP). In addition, detention centres for

²⁶⁷ Regarding the treatment order one would think that due to the name (measure of 'placement in an institution for juveniles') it should be executed in a youth institution, but this is not true; see below).

adults are *inter alia* designated for the enforcement of pre-trial detention (in general), which does not exclude pre-trial detention of children (art. 9 (2) (a) Penitentiary Principles Act).²⁶⁸ Furthermore, according to article 10 Penitentiary Principles Act, adult prisons are meant for the execution of sanctions of deprivation of liberty ('vrijheidsstraffen'), which does not rule out youth imprisonment either. The authority responsible for placement (selection official) can decide to do so if he finds reason in the 'personality of the individual involved' (art. 15 (1) Penitentiary Principles Act).²⁶⁹

Article 9 (2) (i) Penitentiary Principles Act explicitly provides that detention centres can be used to house all those legitimately deprived of liberty if there is no place in an institution where they ought to be placed. This is a legal ground to place children in detention centres if there are no places available in youth institutions (remand homes). This provision evidently violates article 37 (c) CRC, which allows non-separation of children from adults only if demanded by the best interests of the child.²⁷⁰

Finally, it is important to reiterate that when children are remanded in police custody they are held in a police station, which is neither an appropriate place for children, nor a place where children are (necessarily) separated from adults. In addition, article 16a YCIA allows continuation of the child's placement in a police station during his pre-trial detention if there is no place available in a youth institution or if there is no transportation (depending on the age of children). Both grounds are in conflict with the (rationale behind) separation of children from adults and the exceptions allowed by article 37 (c) CRC.

In conclusion, placement of children in adult facilities is not excluded by law. In addition, the law does not provide much (or much clear) guidance regarding the reasons for doing so. It does certainly not sufficiently place the authorities under the obligation to use the best interests of the child as the one and only argument to place him in an adult facility.

²⁶⁸ Act of 18 June 1998, *Bulletin of Acts and Decrees* 1998, 430 (entry into force 1 January 1999). Note that there is hardly any distinction between adults and children in the legislation regarding pre-trial detention; see also para. 4.3.

²⁶⁹ The child can file objections against such placement under art. 17 (1) (a) Penitentiary Principles Act and subsequently appeal the decision on his objections. *Cf* art. 16 (1) YCIA. According to De Jonge & Van der Linden 'more mature youngsters' are *de facto* placed in detention centers for adults; De Jonge & Van der Linden 2004, p. 144. According to art. 16 Ministerial Regulation Selection, placement and replacement of detainee children of seventeen or older (!), not sentenced as adults, who behave immaturely will be placed in a special department (for young adults).

²⁷⁰ Initially, the Dutch government suggested letting the reservation regarding art. 37 (c) CRC aim at this particular situation (i.e. shortage of capacity leading to placement of children in adult facilities), but this part of the reservation was not adopted eventually; see, e.g. Explanatory Memorandum YCIA, p. 10 and para. 4.1.

4.6.2.2 Young Adults in Youth Institutions

As pointed out in paragraph 3.7 the issue of separation of children from adults is largely influenced by the question whether the applicability of juvenile justice provisions depends on the ‘crime date criterion’ or other criteria. The use of the ‘crime date criterion’, which is the most defensible under article 40 and 37 CRC, implies that young adults tried under the juvenile justice system end up being placed in youth institutions together with children. This is defensible under article 37 (c) CRC.

Dutch juvenile criminal law is based on the ‘crime date criterion’.²⁷¹ Children and young adults who are tried accordingly and detained or sentenced to youth imprisonment will in principle be placed in a youth institution. As a result, the age range of children in youth institutions under the juvenile justice system starts at the MACR (i.e. twelve years) and can go up to the mid-twenties.²⁷²

Dutch law does not prohibit young adults from being placed in youth institutions. It does however provide for the possibility to convert the sentence of youth imprisonment into imprisonment (for adults) if the execution takes place after the child reaches the age of majority (art. 77k CrimCo). A child or young adult sentenced to a treatment order under juvenile criminal law can be transferred to an adult treatment centre on the basis of article 77s (5) CrimCo, which stipulates that such a treatment order is executed in a youth institution or elsewhere (*cf* art. 4 (1) (f) of the Treatment Order (Principles) Act (‘*Beginselenwet verpleging ter beschikking gestelden*’).²⁷³ Regarding the possibility to execute the order ‘elsewhere’, the legislator explicitly referred to the transfer of young adults to the adult system. The legislator also argued that a child may be transferred if regarded appropriate for the child’s treatment – an approach that is defensible in light of article 37 (c) CRC.²⁷⁴

²⁷¹ This criterion was reintroduced in 1995.

²⁷² In addition, children under the age of 12 can be placed in youth institutions under child protection law (see para. 4.2). Since 1 January 2008 children under child protection law can remain in youth institutions after they turn 18 (until their 21st birthday; art. 29a Youth Care Act). The ground for placement under child protection law used to expire *ipso jure* on the child’s 18th birthday.

²⁷³ Act of 25 June 1997, *Bulletin of Acts and Decrees* 1997, 280 (entry into force 1 October 1997).

²⁷⁴ *Parliamentary Documents II* 1992/93, 21 327, nr. 13, p. 6; see De Jonge & Van der Linden 2004, p. 111. The Minister of Justice considers preparing legislative change enabling conversion (‘omzetting’) of the treatment order for children into a treatment order for adults, while he recognizes that this may be on strained terms with the CRC. He argues however that strictly such a possibility would not violate art. 40 CRC. He also wants to conduct further research regarding the use of the treatment order (for adults), for children of 16 or 17 years (art. 77d CrimCo); *Parliamentary Documents II* 2005/06, 24 587 and 28 741, no. 183, p. 9. The Council responded in advising the Minister to extend the potential maximum duration of the treatment order for children rather than creating the option to convert it into an adult sanction. It recommended considering transferring the young adult under a treatment order to an adult facility, when he reaches the age of 20. The framework of reference needs to remain the treatment order under juvenile criminal law,

4.6.2.3 Sentencing Children under Adult Penal Law

Another significant issue in this regard under the Dutch CrimCo is the possibility to sentence children, who were sixteen or seventeen years of age when they committed an offence, under adult penal law. If the court finds reason in the seriousness of the crime or the personality of the child offender or in the circumstances of the case (art. 77b CrimCo), the child can be sentenced to imprisonment or to a treatment order for adults, which implies that he will be incarcerated in an adult prison or an adult facility for the execution of treatment orders.²⁷⁵

Although this will be on strained terms with International Human Rights Law if other interests than the best interests of the child are decisive,²⁷⁶ the Dutch government strictly does not violate international law, because it has made a reservation regarding article 37 (c) CRC for this specific application (see para. 4.1).

The Minister of Justice reiterated the presence of this reservation in the Explanatory Memorandum to the YCIA and stressed that it is limited to the application of article 77b CrimCo. He also stressed that consequently as a general rule children must be separated from adults.²⁷⁷ As mentioned earlier, the CRC Committee has recommended the Dutch government to withdraw this reservation and change its practice.²⁷⁸

4.6.2.4 Transportation

The requirement of separation of children from adults stretches to transportation as well. This has not been recognized by the Dutch enforcement authorities, in

which, e.g. implies that education should form part of the daily programme. If the Minister opts for conversion, this should only be done under strict conditions and safeguards; Advice of the Council for the Administration of Criminal Justice and Protection of Juveniles, 'Van 'pij' naar 'bij': advies over de verbetervoorstellen ten aanzien van de pij-maatregel' of 29 June 2006.

²⁷⁵ Art. 16 Ministerial Regulation Selection, placement and replacement of detainees provides that children of 16 or 17 sentenced as adults will be placed in a facility or department for immature adults (young adults department; 'afdeling voor jong volwassenen (jovo)'), unless another facility is found more appropriate. Placement in such a facility is not allowed if a child should be placed in a facility for (alleged) terrorists. However, recently the young adults departments were closed down, but the regulation has not yet been adjusted.

²⁷⁶ Recent research of Weijers reveals that much is unclear regarding the usage of this lawful possibility to sentence children under adult penal law; Weijers 2006. E.g. it often remains unclear which of the three (alternative) grounds has been decisive, due to lack of explicitness of the court's clarification (Weijers 2006, p. 38-39) – a practice condoned by the Netherlands Supreme Court (The Netherlands Supreme Court, 21 November 2000, *NJ* 2001, 97; *cf* Doek 2001).

²⁷⁷ Explanatory Memorandum YCIA, p. 10. A salient point is that the Minister also stressed that if one cannot guarantee this separation, one must report this to the CRC Committee and provide the Committee with the reasons for not living up to this obligation.

²⁷⁸ Concluding Observations of the Committee on the Rights of the Child: Netherlands, 26/10/99, CRC/C/15/add. 114, para. 7 and Concluding Observations: The Kingdom of the Netherlands (Netherlands and Aruba), 26/02/04, CRC/C/15/add. 227, para. 10-11.

particular the Transport and Support Department ('Dienst Vervoer en Ondersteuning') responsible for transportation of individuals deprived of their liberty. The transportation instruction²⁷⁹ provides in article 2.7 that 'juveniles are transported in a separate compartment as much as possible'. This provision leaves room for non-separation on other grounds than those related to the best interests of the child (see art. 37 (c) CRC).

The tension between the transportation of children and International Human Rights Law became particularly apparent in 2007 when the Dutch National Ombudsman concluded *inter alia* that a girl's rights to be separated from adults under article 37 (c) CRC had been violated a couple of times. The girl placed in a youth institution (under child protection law), claimed to be (sexually) harassed by adults two times on her way to court. In the first case she complained about being transported in one compartment together with a woman who confronted her with unwanted stories and harassed her physically. The National Ombudsman ruled that article 37 (c) had been violated since logistical reasons had led to the child's placement in the same compartment with adult women.²⁸⁰

In the second case the girl was not placed in the same compartment as the adult man who sexually harassed her, and it remained unclear whether they had visual contact, but they were able to communicate. The National Ombudsman regarded this situation as a situation of non-separation. Given the fact that this non-separation could not be regarded as in the best interests of the child, article 37 (c) CRC had been violated.²⁸¹

In addition, the National Ombudsman found in both cases reason to conclude that Transport and Support Department violated its duty of special care, because it did not facilitate its officials to adequately supervise the transported individuals, due to limited visual and auditive contact (see paras. 6.2 and 7.2 respectively).²⁸² Clearly, both the instruction and the way of transportation must be changed and brought into conformity with International Human Rights Law.

4.6.3 *Separation Related to Needs, Age and Maturity*

4.6.3.1 Differentiation According to Age and Maturity

As mentioned before, the age range for youth institutions is rather wide (see para. 4.1 for figures regarding the different age groups). In order to protect in particular younger children against negative influences of older children and in order to meet

279 Ministerial circular of 4 July 1998, ref. 675240/98/DJI (prolonged by circular of 27 July 2006, ref. 5399388/06/DJI).

280 National Ombudsman 2007b, para. 7.2. The Ombudsman also referred to art. 2.7 as a provision violating art. 37 (c) CRC.

281 National Ombudsman 2007c, para. 8.2.

282 Cf National Ombudsman 2007a.

each group's specific needs, one should differentiate regarding housing and daily programmes, including the level of education according to age and maturity.

Dutch law hardly acknowledges the differences between children explicitly in this regard. It has recognized differences between children in age and maturity regarding the duration of measures of order and disciplinary sanctions (see para. 4.9). Furthermore, it calls for an individual plan-based approach, which is meant to address the specific needs of the child. Obviously, the child's age and maturity will be taken into account.²⁸³

The YCIA also provides that institutions or departments can be designated for specific usage, which leaves room to establish, for example, a specific wing for younger children (art. 15 YCIA). Many institutions work with groups of different age levels and some institutions even have set with a minimum age for admittance. This is highly recommendable in light of the individual approach a child is entitled to, but also in order to prevent exposure to risks of domination or exploitation by older children.²⁸⁴

4.6.3.2 Separation of Boys and Girls

The general international human rights framework proclaims separation of men and women during deprivation of liberty.²⁸⁵ The children's rights framework does not. It merely calls for equal treatment, which is of particular significance for the girl child (see commentary to rule 26.4 Beijing Rules) and it is thus more related to the principle of non-discrimination rather than to requirements of either protective nature or special treatment.

The population of Dutch youth institutions consists of approximately 25% girls and 75% boys (see para. 4.1). Boys have always formed the vast majority, but the girls' share increased from around 20% to 25% in the nineties.²⁸⁶ The YCIA addresses the position of boys and girls in article 12. It stipulates that boys and girls in remand homes must be separated, while in treatment centres they can be placed either separately or together. The principle of separation of boys and girls in remand homes can be set aside if the remand homes (or a department of it) has been given a special designation (art. 15 YCIA), for instance for children with psychiatric disorders. Given the relatively small numbers of girls in this regard, the Minister of Justice argued that it may not be possible to establish separate institutions for girls.

²⁸³ If the child's age and maturity would give reason to adjust his participation in the group or in group activities, he could be offered an adjusted daily programme (arts. 22-23 YCIA; see also para. 4.8).

²⁸⁴ Age and maturity of children may affect the impact of such negative influences and can have consequences for the constitution of, e.g. prohibited forms of ill-treatment (see para. 3.6).

²⁸⁵ Supported by the regional instruments of the CPT and EPR. Although the latter leaves room for exceptions, e.g. regarding joint activities (rule 18.9 EPR).

²⁸⁶ This proportion may change since 'child protection children' will eventually not be placed in youth institutions anymore.

Therefore the law allows the placing of girls and boys in the same institution, but in different units. Moreover, the YCIA leaves room for group activities of boys and girls in remand homes. However, the use of the above mentioned exceptions or the allowance of joint groups or joint activities is only acceptable if each child has his own room²⁸⁷ and that one always takes into account the size of the number of boys and girls in one specific group and the assumed vulnerable position that girls have compared to boys.²⁸⁸

4.6.4 Separation of Unconvicted and Convicted Children

The issue of separation of unconvicted from convicted children (and adults) has its foundation in article 10 (2) (a) ICCPR, a unique treaty provision in International Human Rights Law. None of the other human rights treaties contain a similar provision. Within the children's rights framework the principle of separation of unconvicted from convicted children is adopted in rule 17 JDLs. This requirement of separation is prompted by the principle of the presumption of innocence, one of the core human rights principles of criminal law, and it is this principle that should be guiding regarding the difference in treatment between the two groups of children. This for example implies that one should recognize that the group of unconvicted children should be granted access to legal counsel in order to enable them to prepare their defence; one should for instance also allow these children to wear other clothes than convicted children if they cannot wear their own (rule 88.2 SMR).

Neither the Dutch system of youth institutions, nor the YCIA distinguish between unconvicted and convicted children. Both groups are placed in the same youth institutions (remand homes). Although there may be different groups for pre-trial detainees and sentenced children (or children placed for other reasons) within the same institutions, this has not been regulated by law and is dependent on the individual institution.

In addition, both unconvicted and convicted children are covered by the YCIA and consequently fall under the same regime and are entitled to the same rights. There are some provisions in which one recognizes the acknowledgement of unconvicted child detainees; regarding incidental leave, for example, explicit reference is made to the Public Prosecutions Office, which must give its approval (art. 34 (2) YCIR).

The separation of unconvicted and convicted children has never been a real issue in the Netherlands regarding youth institution since its development at the beginning of the 20th Century. This is remarkable compared to the adult system, which has a wider variety of different facilities, namely detention centres for pre-

²⁸⁷ See further in para. 4.8.

²⁸⁸ Explanatory Memorandum YCIA, p. 31. The Minister of Justice defended this provision by referring to rule 11 of the 1987 EPR.

trial detention, prisons for imprisonment, institutions for persistent offenders, and, finally, special clinics for the enforcement of treatment orders (see arts. 9, 10 and 11 Penitentiary Principles Act; art. 3ff Treatment Order (Principles) Act).

Although the Netherlands has ratified the ICCPR, it has made a reservation regarding article 10 (2) and (3).²⁸⁹ Consequently, it does not violate these provisions, while not segregating child pre-trial detainees and child prisoners. This leaves unaffected the fact that the Netherlands is compelled to fully respect the presumption of innocence of unconvicted children deprived of their liberty (art. 14 (2) ICCPR, art. 40 (2) (b) (i) CRC and art. 6 (2) ECHR) and that it must grant children in pre-trial detention treatment accordingly. The YCIA does not provide for much explicit guidance in this regard, although it has for example acknowledged the child's right to have contact with his lawyer (see para. 4.8)

4.6.5 Separation of Children under Juvenile Criminal Law and Child Protection Law

As pointed out in paragraph 3.7 International Human Rights Law and Standards primarily proclaim a 'specific needs-based approach' regarding placement of children and contain no obligation to separate children deprived of liberty on different legal grounds derived from different legal systems. Rule 28 JDLs provides that one should seek the best appropriate place for each child. Above all article 37 (c) CRC stipulates that each child deprived of his liberty is entitled to be treated with humanity and respect for his inherent dignity and in a child-specific manner.²⁹⁰

In the Netherlands children can be placed in youth institutions for different reasons and on different (legal) grounds. The two main grounds for placement are based on juvenile criminal law and child protection law, a practice which has a historical context (see para. 4.1). The YCIA does not require institutions to accommodate these groups of children in different units. *De facto*, some institutions have different units for 'child protection children', others have not. The fact that the two groups are often placed in the same units has been justified with reference to the principle that children should be placed where their needs are best met (and that can be in the unit of an institution where juvenile justice children are accommodated as well).²⁹¹

Nevertheless, the CRC Committee criticized Dutch practice in this regard and urged the Dutch government to '[a]void detention of juvenile offenders with

²⁸⁹ See para. 4.1.

²⁹⁰ Cf the approach of art. 8 SMR.

²⁹¹ In addition, both groups show significant similarities, e.g. regarding mental health and/or behavioural problems; see, e.g. Vreugdenhil 2003. Cf Le Sage 2005.

children institutionalized for behavioural problems'.²⁹² Unfortunately the CRC Committee has not specified the reasons for this recommendation. Its position could have been founded on the point of view that children in need of alternative care (child protection) should not be placed in facilities for juvenile justice. It could in addition be defended by the legal point of view that mixing different forms of deprivation of liberty derived from different legal systems would undermine the particular significance of each legal system, in particular the different (legal) reasons for and different objectives of deprivation of liberty.²⁹³ However the differences in objectives between juvenile justice and child protection are less significant since the former clearly has a pedagogical approach. Moreover, in the Netherlands both legal systems have a joint historical context (see para. 4.1).²⁹⁴

One could also argue that Dutch children in need of child protection should not be placed in a youth institution meant for detention or imprisonment under the juvenile justice system. Boendermaker, Eijgenraam & Geurts have concluded that the treatment offered in youth institutions does not meet the specific demands of children placed under child protection law.²⁹⁵ This would be reason to prevent these children from being placed in youth institutions, although it should also give reasons to review the quality of treatment for children placed under the juvenile justice system.²⁹⁶ Another issue that can be raised here is a 'danger of criminal contamination' ('besmettingsgevaar').²⁹⁷

Other research conducted in 2004 concluded that the mixing of both groups of children is experienced as unfair by parents and child protection children, because they are placed together with juvenile justice children.²⁹⁸ The YCIA Evaluation showed that primarily juvenile judges opposed this practice; they found it primarily unjustifiable towards parents and parents would often not understand why their child had to be placed together with 'criminals' in the same facility.²⁹⁹

From the perspective of legal status there seems to be less reason for not placing children in youth institutions; the YCIA provides both groups of children with the same (strong) legal status. A counter argument would be that a child under the child

292 CRC Committee, Concluding Observations: The Kingdom of the Netherlands (Netherlands & Aruba), CRC/C/15/Add. 227, 26 February 2004, para. 59 (d).

293 See, e.g. art. 8 SMR which seems to be based on such approach; *cf* the JDLs.

294 This leaves unaffected the fact that juvenile justice is criminal justice.

295 Boendermaker, Eijgenraam & Geurts 2004. *Cf* National Ombudman 2004.

296 In this regard, it is questionable whether youth institutions can meet the requirements set by the ECtHR regarding deprivation of liberty for educational reasons under art. 5 (1) (d) ECHR; see Bruning, Liefwaard & Volf 2004a.

297 This has never been researched thoroughly, despite – criticized – research, concluding that there was no such danger: Rietveld, Hilhorst & Van Dijk 2000.

298 Goderie *et al.* 2004. Both parents and children found the placement in a youth institution as such not unfair; Goderie *et al.* 2004, p. 116-117.

299 YCIA Evaluation 2004, p. 139-141. Family supervisors were also critical for similar reasons. Youth institutions were generally not against the mixing of both groups.

protection system should be awarded ‘more freedoms’, since the legal status provided by the YCIA (including the permitted limitations) are very much ‘inspired’ (i.e. dominated) by the need to establish a rather strict (and maybe even punitive) regime for child delinquents. This view is supported by the fact that YCIA shows significant resemblance to the penitentiary laws for adults (see para. 4.5). On the other hand, this counter argument seems to be invalid in light of the assumption that each child deprived of his liberty keeps his entitlements under (international) human rights law, which has also been the foundation of the YCIA. One could, however, argue that these children under child protection law are entitled to less potential limitations than provided by the YCIA.

This issue of separation or non-separation has been subject to a large political and academic debate in the Netherlands. In 2004 the Dutch government decided to establish two separate systems: one new system of closed youth care for children in need of (alternative) care under the Ministry of Health Care (and Ministry of Youth and Family) and one juvenile penitentiary system for children detained or imprisoned in the context of the juvenile justice system (i.e. youth institutions) under the full responsibility of the Ministry of Justice.³⁰⁰ This is a fundamental breach with the history of child care and protection in the Netherlands, in which child protection as well as juvenile justice fell under the (political) responsibility of the Ministry of Justice. Although it goes beyond the scope of this study to dwell on this, the shift raises a lot of questions. Closed youth care (i.e. a measure of civil child protection) fits the national system of youth care regulated by the 2005 Youth Care Act. However, it insufficiently acknowledges that child protection is (and always has been) a matter of justice, since it infringes the child’s and his parents’ (guardian’s or caretakers’) family life and should be governed primarily by the Civil Code; the same applies to its most far-reaching form: deprivation of liberty of children in closed youth care. In addition, it is questionable whether the newly adopted regulation regarding the legal status of children in closed youth care meets the requirements set by International Human Rights Law and Standards. This requires further research, but based on a first analysis the conclusion can be drawn that the legal status of children in (future) institutions of closed youth care has worsened compared to the YCIA. Although the number of potential legal limitations have been reduced and disciplinary sanctions abolished (*cf* paras. 4.9), the new law gives the institutions almost unlimited discretion regarding individual (forced

300 Letter of the Minister of Justice and State Secretary of Health Care of 1 July 2004 (5295504/04/DJC) regarding ‘Plan of action regarding ‘non-separation’ of children in youth institutions’. The plan was based on the final report of the working group ‘Optimaliseren zorgaanbod voor jeugdigen met gedragsproblemen’ (Optimizing care programmes for children with behavioural disorders), which has founded its conclusions on Boendermaker, Eijgenraam & Geurts 2004, Goderie *et al.* 2004 and the YCIA Evaluation 2004; see *Parliamentary Documents II* 2003/04, 28 741, no. 8 (incl. attachments).

medical) treatment and has in addition reduced the level of legal protection for children and parents (i.e. regarding legal safeguards and means to submit requests and to have one's views heard, and regarding division of competences). In addition, supervisory committees and monthly visits of a supervisory official ('maandcommissaris') are no longer compulsory and the complaints procedure is ambiguous (and essential requirements such as (legal) assistance are regulated by a lower decree rather than by statutory law).³⁰¹

Moreover, the new regulation does not provide any specific guidance regarding minimum conditions of institutional life (such as, e.g. education). Although, according to the legislator, the point of departure is that each child placed in closed youth care is merely forced to stay in and around the facility, but for the rest of the time keeps all his rights and freedoms, it is questionable whether the legislator has fulfilled his positive obligations under article 37 (c) CRC.³⁰²

Nevertheless, the fact is that before 1 January 2010 the two groups of children must be separated and housed in separate facilities – a major operation that has placed both the legislator and executing authorities under new and large responsibilities.

4.6.6 Conclusion

This paragraph discussed the relevant issues of separation of different groups of children deprived of their liberty in Dutch youth institutions: separation of children from adults, separation of children according to age, maturity and needs, including separation of boys and girls, separation of unconvicted and convicted children and finally, separation (or non-separation) of 'juvenile justice children' and 'child protection children'.

Separation of children and adults in the Netherlands is to a large extent part of the separate system of juvenile justice; there have been separate institutions for children since the 1905 Child Laws. This does not mean that children cannot and are not placed together with (young) adults. There is no (statutory) prohibition of placement of children in adult facilities. On the contrary, adult penitentiary laws (explicitly) leave room for the reception of children in adult detention centres, prisons or clinics. Furthermore, juvenile criminal law provides that deprivation of liberty as a disposition can be executed in adult facilities, either through conversion (youth imprisonment) or as a matter of enforcement (treatment order). There are also young adults accommodated in youth institutions due to the applicability of the 'crime date criterion' in the juvenile justice system. Some of these legal provisions are based on the principle of finding the most appropriate place for the child (or young adult), but

³⁰¹ See Diepstraten 2008.

³⁰² *Parliamentary Documents II* 2005/06, 30 644, no. 3, p. 15. Cf e.g. Liefwaard 2006.

some are merely prompted by the efficient use of capacity. The latter foundation is in violation of article 37 (c) CRC, which only allows diversion from the provision that children must be separated from adults if required by the best interests of the child.

Another issue of concern is the legal possibility to sentence children of sixteen or seventeen when committing an offence, under adult penal law, which can lead to deprivation of liberty in the adult system. Strictly, the Netherlands does not violate article 37 (c) CRC, because the Dutch government has made a reservation for this specific application. However, it has received the CRC Committee's specific criticism twice. Moreover, the CRC Committee explicitly rejected this practice in its General Comment on juvenile justice.

Finally, an issue of great concern that does violate article 37 (c) CRC concerns transportation of children while they are not separated from adults. Additionally, the regulation in this regard needs to be reviewed.

Second, the issue of internal differentiation according to age and maturity has been addressed. The YCIA does not address this particular issue, but leaves room to do so, which is recommendable given the wide age range. Institutions do *de facto* take into account the age and maturity of the child. The differences (and differentiation in treatment) between boys and girls have been acknowledged to some extent by the Dutch legislator by providing for rules regarding separation of these groups and allowing non-separation under the condition that one takes into account individual interests and the potentially vulnerable position of girls.

Separation of unconvicted and convicted children has generally not been acknowledged in youth institutions, contrary to the adult system, which distinguishes detention centres and prisons. The YCIA does not address the group of pre-trial detention specifically, although it recognizes for example the right of the child to have contact with his lawyer. Although this is on strained terms with International Human Rights Law, in particular with article 10 (2) and (3) ICCPR, the Netherlands strictly is not in violation, due to its reservation in this regard. Despite this reservation, the presumption of innocence should be upheld regarding children in pre-trial detention.

Finally, this paragraph highlighted the issue of 'non-separation' of children under the juvenile justice and child protection system. It should in general be governed by the requirement to find the best appropriate place for each child, regardless of the legal ground for deprivation of liberty. However, this can only work in the situation if that institution is fully appropriate to accommodate children under the juvenile justice system and under child protection and to address their specific needs. The debate regarding this issue in the Netherlands has included all kinds of arguments: historical, (ortho)pedagogical, medical and legal arguments implying *inter alia* that the objectives of both systems are the same, but could also be different, that legal

safeguards for children (and their parents) differ and that the legal climate would be inappropriate. The debate was also influenced by the critique of the CRC Committee, although it has not clarified its specific considerations. The treatment offered in youth institutions was heavily criticized as inappropriate for the special needs of children under child protection. The danger of contagion also played a role, although this has not been subject to in-depth research. Furthermore, research pointed at the strong feelings of unjustified treatment by ‘child protection children’ and their parents.

As a result of this debate the Ministries of Justice and Health Care have decided to split up both groups and establish separate institutions for closed youth care (some of which are new, some of which are former youth institutions) – an operation that started in 2008 and is planned to be finished in 2010. By this political decision, one decided to cut through the historically grown ties between juvenile justice and child protection. In addition, one left the YCIA and adopted a completely new regulation of legal status for children in closed youth care. This is not necessarily a very well considered change of policy and as a minimum requires full attention and further research.

4.7 ADMINISTRATIVE ASPECTS OF PLACEMENT

4.7.1 Introduction

There are a number of administrative aspects that are of significance for the execution of deprivation of liberty of children. Besides the separation issues addressed in the former paragraph the following aspects play an important role for the implementation of International Human Rights Standards: selection, placement and transfer, admission, information for child and family, and records and files (*cf* para. 3.8).

The administrative aspects should contribute to the realization of the quality of treatment of children deprived of their liberty which they are entitled to under International Human Rights Law, particularly under article 37 (c) CRC. This treatment is served by a careful selection, placement and transfer, full information regarding the child’s legal status for both the child and his family and transparency for child, family and society. Obviously, these aspects are of significance for the realization of the objectives of deprivation of liberty as well. This paragraph addresses the administrative aspects concerning placement in Dutch youth institutions.

4.7.2 *Selection, Placement and Transfer*

4.7.2.1 Selection and Placement

The YCIA provides a central role for the ‘selection official’, working at the Individual Youth Affairs Department of the National Agency for Correctional Institutions of the Ministry of Justice (art. 16 YCIA), regarding the selection and placement of children.³⁰³ The selection official has the responsibility to select the institution where the child shall be placed. The selected institution subsequently has the obligation to admit the child (art. 16 (3) YCIA). The appropriate placement is determined by various factors, such as the functions of the institutions and whether they are closed or (semi-)open, the personal characteristics of the child, including sex, age and maturity and the location of the child’s community, including the child’s family’s place of residence. The selection official should take into account these factors and give them due weight, which is not an easy task given the potential conflict of interests (see also para. 3.8).

The YCIA provides selection criteria in article 16 (1) YCIA. If the child’s deprivation of liberty is ordered, the selection official places the child in accordance with the institution’s designated use; he can divert from this point of departure for reasons related to the child’s personality. If more than one institution can be regarded as appropriate, the key principles for the execution of deprivation of liberty must be decisive, that is the objectives of institutional stay: security, upbringing, reintegration and treatment, if applicable (art. 2 (2) YCIA), the principle of speedy start of the execution (art. 2 (3) YCIA) and the doctrine of minimal limitations (art. 2 (4) YCIA). Article 16 (1) YCIA is formulated in a certain order.³⁰⁴ The difference principles may have different implications and conflicts are not excluded; a few remarks will be made.

The YCIA makes a general distinction between remand homes and treatment centres and articles 9 and 10 YCIA determine on which grounds children can be placed there. Under the juvenile justice system remand homes are designated for pre-trial detention and youth imprisonment and treatments centres for the execution of a treatment order. Remand homes can, however, also be used for placement of children under a treatment order waiting for an appropriate place in a treatment centre. This fits the principle of speedy start of the execution of the ordered

³⁰³ Placement includes all kinds of placement such as replacement, transfer, referral, temporary placement somewhere else; *cf* Bonarius 1997, p. 65.

³⁰⁴ 1. placement according to designated use; 2. placement according to the personality of the child; 3. placement in accordance with the objectives of the deprivation of liberty, with the principle of speedy enforcement and with the doctrine of minimal limitations. See Explanatory Memorandum YCIA, p. 37.

deprivation of liberty.³⁰⁵ Furthermore, there are institutions (or departments) designated for boys or girls (art. 12 YCIA; see para. 4.6). Both differentiations can be regarded as two objective aspects of placement. The nature of the order or sentence and the child's gender determine to a large extent where the child is placed and the selection official is primarily guided by the objective criteria embodied in the law.

In addition, there are two other relevant aspects, related to institution's designated use, namely the level of security and special designation, both implying (some) more discretion for the selection official.

The YCIA distinguishes between youth institutions with a 'normal security level' (i.e. closed institutions) and institutions with a 'limited security level' (i.e. (semi-)open institutions).³⁰⁶ Based on the Ministerial Regulation regarding Placement and Transfer of Juveniles³⁰⁷ remand homes are closed institutions, while treatment centres can either be closed or (semi-)open. As a consequence, only children under a treatment order can be placed in (semi-)open institutions, provided that other criteria have been met as well. These include *inter alia* that such placement fits the child's treatment programme and that there is a minimum risk that the child will escape from the execution of this deprivation of liberty (see art. 2).³⁰⁸ By implication a child can only be transferred to a (semi-)open institution after his initial stay in a treatment centre (see further below), which again limits the selection official's discretion and makes this decision dependent on information (and most likely initiative) from the treatment centre where the child resides.³⁰⁹ Thus, the selection official has the possibility to place a child in a (semi-)open institution; this option is, however, not available for all categories of children deprived of liberty and is not at his sole discretion. In addition, the point of departure will be that a child is placed in a closed institution.³¹⁰

305 In addition, art. 11 YCIA stipulates that an appropriate place must be found within three months, with the option to prolong this term. De facto, there are waiting lists causing serious problems, as discussed in para. 4.3.

306 Art. 14 YCIA. The Minister of Justice determines the security level. The legislative proposal embodied a third security level, namely special security, which could be best compared with a maximum security prison for adults. Later the Minister of Justice argued that such a regime would be inappropriate for children (*Parliamentary Documents II* 1998/99, 26 016, no. 6, p. 14).

307 Ministerial Regulation regarding Placement and Transfer of Juveniles, 5113405/01/DJI, 14 August 2001, *Government Gazette* 2001, 156.

308 Moreover, child refugees waiting for expulsion or extradition are excluded (although it is unlikely that they will be sentenced to a treatment order), as are those who have to serve another custodial sentence or measure.

309 However, the selection official can place a child in a (semi-)open institution on the direction of the Public Prosecutions Department or order of the court.

310 Bartels 2003, p. 172-173. According to Bartels there is a policy that children sentenced to a treatment order will be placed in an institution with a regular security level first, even though this is not compulsory under the YCIA. He also argues that if the court advises placement in an open

Another subjective aspect of the selection process is the possibility to place a child in an institution with a specific purpose (and related specific treatment programmes; art. 15 YCIA). Placement in such an institution depends on the child's age, his physical or mental development, which includes his level of intelligence,³¹¹ his residential or treatment plan or the nature of the committed offence. This option is of particular importance for children who are in need of (very) intensive care of treatment (allegedly) caused by a psychiatric or personality disorder (arts. 22a and 22b YCIA).³¹² This placement requires a specific assessment by the selection official.

In the Explanatory Memorandum³¹³ the Minister of Justice announced that he will provide rules regarding selection criteria in the Ministerial Regulation regarding Placement and Transfer of Juveniles (art. 16 (6) YCIA), which would include the instruction that the child must be placed as close as possible to the place of his habitual residence (often his family's residence). Although the Ministerial Regulation does not include this instruction, one must assume given the clearly expressed intention of the Minister that the selection official is obliged to place a child accordingly. In addition, the 1994 Decree Enforcement Juvenile Criminal Law ('Besluit tenuitvoerlegging jeugdstrafrecht 1994')³¹⁴ provides explicitly that youth imprisonment should be executed as speedily as possible, in a place as close as possible to the child's residence (art. 16).³¹⁵

This rule is particularly important for the child's right to maintain contact with his family (art. 37 (c)), the continuity of his upbringing (art. 2 (2) YCIA jo. art. 20 CRC) and his eventual reintegration (art. 40 (1) CRC). Although it could be regarded as the overarching principle, a view supported by International Human Rights Standards, there may be reason to make an exception, for example when the child has to be placed in a specialized institution rather far away from his home town.

Decisions of the Appeals Committee in cases of objections filed by children (see para. 4.10 for more on this procedure) confirm the rule and the possibility to make an exception. For instance, in a case where a child was placed in an institution in an eastern province of the Netherlands, a placement deemed necessary for the child's

setting (limited security level), an appeal against such placement may be successful.

³¹¹ Explanatory Memorandum YCIA, p. 32.

³¹² In this regard art. 16 (5) YCIA provides that a psychiatrist must be consulted. In the Netherlands, there are two youth institutions which have a 'forensic observation and care department' ('forensisch observatie en begeleidings afdeling (FOBA)').

³¹³ Explanatory Memorandum YCIA, p. 37.

³¹⁴ Decree of 12 December 1994, *Bulletin of Acts and Decrees* 1994, 866.

³¹⁵ The former Youth Services Act provided a number of criteria that had to be taken into account, such as that placement in a youth institution must be done so in the least restrictive way and as close as possible to the child's residence. In addition, the placement had to be for the shortest possible period of time; see art. 23 (old) Youth Services Act.

treatment. The child, however, preferred to be placed in an institution in the north-west of the country, which was closer to his family. The Appeals Committee ruled that even though the placement in the east was not in the vicinity of his family, it could be regarded as the most appropriate place, because that institution could address the child's specific needs.³¹⁶

In conclusion, placement inside the child's region must be favoured, but not at the expense of what is needed in the best interests of the child.

It is important to emphasize that the selection official has no competence to place a child without a lawful decision ordering the child's deprivation of liberty (art. 37 (b) CRC and rule 20 JDLs). Institutions are not allowed to admit a child if there is no order. Under the juvenile justice system the Public Prosecutions Office is responsible for the execution of orders, leading to pre-trial detention, youth imprisonment or treatment. Based on article 16 (4) YCIA the selection official must take into account the directives of the office. The same applies to an advice of the judge or court regarding the execution of its sentence(s) (art. 77v (1) CrimCo; see para. 4.3). This provision is meant to safeguard the 'influence' of these authorities on the child's placement.³¹⁷ The obligation of the selection official to take directives or advice into account generally implies, according to the Minister of Justice, that they will be followed. However, he may not do so if there are practical problems or the directives or advice does not correlate with the places available.³¹⁸ A key problem regarding the execution of the deprivation of liberty order is the fact that the availability of (the most) appropriate places is a daily changing reality. The directives of the Public Prosecutions Office or the advice of a judge may lose its meaning due to the fact that the intended placement is *de facto* not possible any more (or within a reasonable period of time) because of lack of places. It *de facto* means that a lot of power is in the hand of the prison administration, that is the selection official. Under the YCIA the decision of this official can be challenged in an objection procedure (including subsequent appeal proceedings; see para. 4.10). According to the Appeals Committee the selection official may only divert from the court's advice if it turns out to be out of date or cannot be enforced.³¹⁹

³¹⁶ Appeals Committee, 11 December 2003, 03/2182/JB. See also Appeals Committee, 19 November 2003, 03/2111/JB.

³¹⁷ Explanatory Memorandum YCIA, p. 35.

³¹⁸ Explanatory Memorandum YCIA, p. 36. Efficient use of capacity was another reason for central selection and placement.

³¹⁹ Bartels 2003, p. 172-173. See, e.g. Appeals Committee, 11 December 2003, 03/2182/JB and Appeals Committee, 19 November 2003, 03/2111/JB. In the latter case the Appeals Committee argued that experts and courts lack (enough) information on the specific treatment programmes for children available in the youth institutions.

Above all, the interests of the child, including the appropriate response to the committed offence, should be paramount, rather than the mere optimization of capacity.³²⁰

According to the YCIA Evaluation the directors and unit leaders of the youth institutions were in general rather satisfied about the role of the selection official. Other key players, such as the juvenile judges, were not very outspoken, although they found of importance the fact that they are able to influence the selection and placement. Most of the juvenile judges argued that they had too little influence.³²¹

In conclusion, the need for careful selection and placement of children in accordance with the law, while taking into account the objectives of placement and special needs of the child has been acknowledged in the Dutch legal system. This should be welcomed in light of the right of the child to be treated in accordance with article 37 (c) CRC and in a manner that contributes to his eventual reintegration in the community (art. 40 (1) CRC). There is little guidance in the international legal framework on the actual selection and balancing of relevant criteria and aspects. The Dutch legislator has chosen a centralistic approach, which seems to be supported by the institutions.³²² The juvenile judges are to some extent worried about their limited influence on the placement as such.

The balancing of the different determining factors is difficult and not always clear. In any case, one should avoid selecting on the basis of efficient use of capacity only, because this can be a serious threat to the interests of the child (and eventually the interests of society). One can conclude that although the legislator has, in its attempt to provide guidance regarding selection and placement, drawn up a list of relevant criteria in a certain order, it remains hard to find out which criteria should be paramount. Furthermore, it seems that efficient use of capacity has played a significant role in this regard and sometimes a bigger role than the quest of finding the best appropriate place. This seems to be confirmed by the formulation of article 16 (1) YCIA taking the available institutions as the point of departure and by the introduction of article 16a YCIA. It stresses the importance of clear and well-motivated decisions directed towards the child, which he can challenge by

³²⁰ This is a particular difference between the youth system and the adult system, on which the introduction of the selection official has been based; Explanatory Memorandum YCIA, p. 35. In this regard it is also important to reiterate that the selection official has the competence to keep children at the police station for a number of days if there is no place available in an institution (for children of 16 and older; max. 10 days) or if there is no transportation (children between 12 and 16; max. 3 days); art. 16a YCIA. The rationale behind this provision for older children was a lack of capacity in youth institutions; *Parliamentary Documents II*, 2001/02, 28 202, no. 3, p. 1-5.

³²¹ YCIA Evaluation 2004, p. 188.

³²² This is different regarding decisions on leave and reintegration programmes; see para. 4.8 and 4.11.

exercising his right to file objections (see further para. 4.10); in addition, he has the right to request a transfer.³²³

4.7.2.2 Transfer

Replacement or transfer (hereinafter: transfer) takes place on the recommendation of the director of the institution in which the child resides (art. 8 (3) Ministerial Regulation regarding Placement and Transfer of Juveniles). It can be prompted by substantive considerations or as part of a disciplinary sanction or measure of order and safety (see para. 4.9). If the child is waiting in a remand home for an appropriate place in a treatment centre, it is the selection official who must instigate the transfer as soon as there is an appropriate place available.³²⁴ A child can also make a request for transfer (art. 19 YCIA; see further para. 4.10).

The criteria for transfer are the same as those regarding the initial placement, as addressed in the former paragraph. Regarding transfer as part of a disciplinary sanction or measure of order, the grounds for transfer are explicitly provided by the YCIA (e.g. if there are serious objections to the execution of a measure of confinement in that particular institution; see para. 4.9). As pointed out in paragraph 3.8, International Human Rights Standards provide that a child should not be transferred arbitrarily (rule 26 JDLs). Two important reasons behind this principle are the avoidance of grave human rights violations, such as *detention incommunicado* and fostering mutual contact between the child and his family (arts. 37 (c) and 9 (4) CRC). In this regard, it is important that decisions for transfer are not made lightly, but only based on carefully considered decision-making. The YCIA does not prohibit arbitrary transfer, but one can assume that it aims at fostering careful decision-making (*cf* the Ministerial Regulation of Placement and Transfer of Juveniles). In addition, it provides the right to file objections.

According to the Appeals Committee it is important from a pedagogical point of view to let the child participate (i.e. to keep him informed) in the decision-making process prior to the transfer.³²⁵ Based on article 12 CRC the child has the right to be heard in the decision-making process.³²⁶ Since the YCIA does not include particular instructions in this regard, the significance of, for example, the child's right to request a transfer becomes apparent.

³²³ As mentioned in para. 4.3, the child has no right to challenge the application of art. 16a YCIA.

³²⁴ Based on art. 11 YCIA the child must be placed in a treatment centre within three months. Although the YCIA does not provide instructions in this regard, based on the jurisprudence of the Appeals Committee, the selection official should inform the child in writing if this term is prolonged (and with reasons if prolonged more than once); Appeals Committee, 10 May 2004, 04/0374/JW.

³²⁵ See, e.g. Appeals Committee, 27 March 2003, 02/1834/JA.

³²⁶ This certainly is not only a matter of pedagogical interest, but also of the recognition of a fundamental right of the child (art. 12 CRC).

Furthermore, it is vital that the child's family is informed immediately after the child's transfer. The YCIA provides that the child's parents (or *inter alia* his legal guardians) must be informed immediately after a decision to transfer the child as part of a measure of order (arts. 26 (5) and 27 (5) YCIA). The YCIA lacks a similar provision regarding transfer as disciplinary sanction.³²⁷ More in general, the YCIA does not contain an explicit instruction to inform the child's parents upon transfer, which is a serious omission (see para. 4.7.4).

Finally, an important aspect of transfer is the transportation. As mentioned earlier, transportation of all prisoners, including children in the Netherlands is delegated to the Transport and Support Department of the Ministry of Justice. The practice of this transportation does not meet the relevant provisions of International Human Rights Law, in particular the separation of children from adults (see para. 4.6).³²⁸

4.7.3 Admission

Based on article 16 (3) YCIA institutions have the obligation to accept a child after the selection official has selected it. Upon arrival, the director of the institution determines the right place (within a group or unit) for the child; this can imply that the child is placed in a special unit, given his age, his mental or physical development, the enforcement of the residential or treatment plan, or the offence committed (art. 17 (1) jo. 15 (2) YCIA). In this regard the director can set his own criteria.

The YCIA's point of departure is that children stay in groups (or participate in group activities) for a legally prescribed minimum duration of twelve hours a day during the week and 8.5 hours per day at weekends (art. 22 YCIA). In addition, each child will be allocated his own, private room (i.e. a cell) where he in principle stays when he is not in the group (particularly during night; see para. 4.8). The director can place the child in an 'admission programme', during which the child follows a different programme and does not stay in a group for the legally prescribed minimum duration (art. 23 YCIA). This enables the institution to prepare the child's placement in a particular group/unit and/or to draw up a residential or treatment plan (see para. 4.11), which justifies the temporarily limitation of freedom of movement (i.e. participation in a group and daily activities).³²⁹ The admission programme requires an explicit decision (a decision which the child can remedy by filing a

³²⁷ According to the Appeals Committee, 7 August 2003, 03/0379/JA, the director does neither have the duty of care, nor the competence to inform the parents in such situation; see para. 4.9 for more on this.

³²⁸ The selection official can order the use of restraint during transportation (art. 40 (2) YCIA; see para. 4.8).

³²⁹ Although, this will primarily be relevant for placements with a (fixed) long-term perspective.

complaint; see para. 4.10); the programme can last for one week and can be prolonged twice.

The YCIA does not explicitly provide for a medical check upon arrival, which could be explained by a reference to the high standard of the national health care system and the other YCIA provisions regarding health care, which do not exclude an immediate medical check (see also para. 4.8).

Another significant aspect of the admission process is that the child and his family are provided with adequate information (see below para. 4.7.4) and that a personal file will be opened (see below para 4.7.5).

4.7.4 Information for the Child and His Family

4.7.4.1 Information for the Child

Having a legal status is one thing – being aware of it is another. Information for the child in this regard is vital. According article 60 YCIA the director must take care that the child is informed of his rights and duties under the YCIA and the other regulations. This must be done in writing and, ‘as far as possible in a language the child understands’. This explicit reference to a language that the child ‘understands’ does not only imply that the child must be able to understand the language; he must also understand the content of the information (see para. 3.8 for the different dimensions of understanding). The Minister of Justice acknowledged the significance of this approach. In the Explanatory Memorandum he argued that all those directly involved must consider it their task to provide the child with the required information and enable the child to understand it. If necessary the ‘interpreter’s telephone’ must be used. The Minister also stressed that the Ministry of Justice would facilitate the development of translations of the different regulations in the most common languages.³³⁰ Despite these best intentions the wording ‘as far as possible’ leaves room for not or inadequate informing, which can hardly be reconciled with the great significance of the duty to inform.

According to the second paragraph of article 60 YCIA the child must be informed in particular of his rights to make a request or enter an objection regarding his placement or transfer, to approach the ‘supervisory official’, who visits the institution twice a month on behalf of the institution’s supervising committee,³³¹ and

³³⁰ Explanatory Memorandum YCIA, p. 63.

³³¹ Cf art. 20 (1) YCIR which provides that the committee must hold a consulting hour at least twice a month, which must be made widely known in time.

to file a complaint or to lodge an appeal before the complaints committee and the Appeals Committee, respectively.³³²

De facto the child will receive a copy of the internal rules upon admission or there must be a copy available in the unit or in each room. One can question whether this satisfies the requirement of article 60 YCIA. The internal rules are designed according to the Ministerial Regulation Model Internal Rules Youth institutions.³³³ This can hardly be regarded as a child-friendly model and it therefore certainly is not enough to provide the child merely with a copy of the internal rules. It is highly recommendable to provide additional information (in writing or during the intake conversation which takes place in many institutions), while taking into account the child's age and maturity. This is significant, since the YCIA as a whole pays little explicit attention to the potential diversity between children according to age and maturity. Fostering real understanding of a child's legal status requires more than merely handing out the internal rules. In addition, as the Explanatory Memorandum rightfully stresses, the provision of information must not be limited to the moment of admission, but should form part of a constant duty of care of the institution.³³⁴ In this regard it is also important to point out the duty to inform a child in writing of decisions to limit his civil rights, such as disciplinary measures. This should include information on the legal remedies (art. 62 (4) YCIA; see para. 4.10)

The YCIA Evaluation made clear that institutions are reluctant to provide the child with full information about his legal rights. This seems to be prompted by a certain fear that too much focus on the rights of the child could have a negative influence on the institution's pedagogical climate; it may even invite the child to 'abuse' his legal status. On the other hand, both staff and directors were aware of the need for information and were generally supportive of the idea.³³⁵

It is questionable whether there is enough information material available for children (from abroad) who are not capable of understanding or speaking the Dutch language. The YCIA Evaluation showed that there are no translations of regulations regarding the child's legal status and governing institutional life. If the child is not capable of speaking or understanding the Dutch language, his only hope is that there

332 See para. 4.10 for more on these organs. In addition, a refugee child must be informed explicitly about his right to inform the consular representative of his country about his deprivation of liberty (art. 61 (4) YCIA).

333 Ministerial Regulation Model Internal Rules Youth institutions, 5113416/01/DJI, 14 August 2001, *Government Gazette* 2001, 156. Cf Heide-Jørgensen, Jeldes & Groenendaal 2007 who criticize the internal rules in their conformity with the YCIA.

334 Explanatory Memorandum YCIA, p. 63. The Minister mentioned that most of the institutions show a video presentation upon arrival. The experiences with such presentation are good. However, the Minister also stressed that this could not replace the (availability of) written materials. Although he found that the YCIA was not the place to prescribe the ways of providing information.

335 YCIA Evaluation 2004, p. 131-138.

is a staff member who can speak his language. However, if the child wants to file a complaint he is entitled to the assistance of an interpreter, which must be organized by the supervisory official or the complaints committee (see art. 64 and 70 (2) YCIA). *De facto*, this does not happen very frequently, but if so a professional interpreter can be arranged. It is remarkable that the majority of directors and unit leaders indicated that staff members also serve as interpreter; this should be avoided, since it can hardly be regarded as a satisfactory alternative and violates the right of the child to be assisted by a professional interpreter.³³⁶

It is furthermore important to note that children explained that they increasingly become aware of their legal status during their stay.³³⁷ The YCIA Evaluation pointed out that in general children are aware of their rights, but that this cannot be attributed to activities of the institution. Children share their experiences among themselves and learn from each other. This can have the desired result in terms of awareness, but there is a serious risk that children are misinformed. In addition, children argued that they see their group leaders as the most valuable source of information regarding their rights, particularly those regarding legal remedies and dispute resolution. Group leaders, however, can hardly be regarded as independent and there may be a serious risk of conflicts of interests. Again this stresses the need for adequate information upon arrival and during the stay. In addition, more objective and impartial sources should be available. One could think of the supervisory official and/or committee, a (child) legal aid centre or children's ombudsman and of course the child's legal counsel (*cf* art. 37 (d) CRC and paras. 3.4 and 4.4)³³⁸

In conclusion, the YCIA rightfully places institutions under the obligation to provide children with information on their rights (and duties) during their stay in the institution. There are however some serious concerns about the implementation of this duty to inform. Although it is fair to conclude that children in general are aware of their rights, both law and practice seem to underestimate the vast significance of the open and constant communication between institution and child in this regard. In addition, there is a duty to inform the child's family, which will be addressed below.

³³⁶ YCIA Evaluation 2004, p. 168.

³³⁷ YCIA Evaluation 2004, p. 131-138; *cf* Bruning, Liefwaard & Volf 2005.

³³⁸ In this regard, it is regrettable that the Dutch government has decided to cut back the grants of the child legal aid centres, in particular in light of the absence of a national children's ombudsman and the often little contact between children and their lawyers after disposition. Fortunately, there still are a few child legal aid centres, mostly run by enthusiastic law students, which manage to maintain actively involved in youth institutions.

4.7.4.2 Information for the Family

The YCIA does not contain a specific provision requiring that the child's family, in particular the child's parents or legal guardians, or step or foster parents (hereinafter: family or parents) must be informed about all aspects of their child's stay in the institution. The Minister of Justice has pointed out that because the child's parents are entitled to represent their child regarding the making of requests, lodging objections (e.g. against placement) or filing complaints, they must be informed in writing under article 60 (2) YCIA.³³⁹ However, this seems to be limited to information about the procedures mentioned in article 60 YCIA and it is not clear whether this information is provided in general terms at the time of the admission of the child or only when a specific decision is made that is open for one of the mentioned procedures.³⁴⁰

Implicitly there is a duty to inform the child's parents regarding the possibilities to visit their child, which includes for instance information on the visiting hours (see para. 4.8).³⁴¹ In addition, the parents must be able to understand the information, which may require translation or assistance regarding interpretation if the parents do not speak or understand Dutch.³⁴²

The YCIA does occasionally provide that parents must be informed, for example if their child has been placed in confinement as a measure of order for more than 24 hours (art. 25 (6) YCIA) and also immediately after a child has been temporarily transferred to another institution either for confinement or as a measure of correction (art. 26 (5) resp. 27 (5) YCIA; see para. 4.7.2.2).³⁴³ Furthermore, the parents must be informed about the possibility to represent their child in exercising his rights to submit requests, file objections or complaints and lodge appeals (art. 80 (2) YCIA; see para. 4.10).

³³⁹ Explanatory Memorandum YCIA, p. 63; *cf* art. 80 (2) YCIA.

³⁴⁰ In addition, this does not seem to cover the fact that the child's parents must be informed about the procedure for lodging an appeal against medical decisions ex art. 61 (1) (c) YCIR.

³⁴¹ Appeals Committee, 25 June 2004, 04/0732/JA.

³⁴² See in this regard Appeals Committee, 9 March 2005, 04/2936/JA in which case the letter with information on visiting hours was only available in Dutch, while the parent could not speak Dutch. The Appeals Committee found that the complaints committee rightfully ruled that the institution violated its duty to inform the child's parents appropriately. NB. the reasoning of the was inaccurate; it based the right of parents to visit their child on art. 80 YCIA, while this provision contains the authority to represent the child *inter alia* regarding complaints procedures; the Appeals Committee should have referred to art. 43 (7) YCIA instead (see para. 4.8).

³⁴³ It should be noted that the director is *not* entitled to inform the parents regarding a disciplinary sanction imposed on the child, while this can also lead to confinement and transfer to another institution (comparable to a measure of order). The YCIA does not provide such a provision and the Appeals Committee ruled that the director does 'neither have the duty nor the competence' to inform the parents regarding the disciplinary sanction of confinement; Appeals Committee, 7 August 2003, 03/0379/JA. See also paras. 4.8.6 and 4.9.3.

Despite the absence of clear instructions regarding information for the child's family and parents in the YCIA, the YCIR provides for a number of activities in which parents can be involved, unless they do not want to be involved or if there are serious objections against their involvement. These include the drawing up and evaluation of the child's residential or treatment plan or the recommendation for the child's participation in an STP or release on licence ('proefverlof'; art. 25 (5) YCIR resp. art. 8 (6) and art. 42 (4) YCIR). This involvement obviously implies a full provision of all relevant information.

Finally, it is important to know that parental involvement is regarded as (very) important by almost all respondents of the YCIA Evaluation. This makes it likely that parents are *de facto* informed.³⁴⁴ Still, it would have been better to adopt this firmly in the YCIA.

4.7.5 Records and Personal Files

The final issue of this paragraph concerns the child's personal file and the maintenance of records. Each child in a youth institution has its own file. It is the director's duty to create such a file (art. 63 YCIA). The YCIA provides which information must be stored in the file as a minimum: reports regarding the child made by or for the institution regarding the enforcement of the child's deprivation of liberty, the residential or treatment plan, reports of the meeting where such plan has been drawn up or changed, evaluation reports, admission or exit data and notes regarding the imposition of disciplinary sanctions (art. 63 (1) YCIA). The YCIR contains specific rules for the composition and the content of the file. Each file must be composed carefully according to a standard layout. The National Agency for Correctional Institutions has provided such a layout, divided into five parts: personal details, judicial details, residential and treatment details, details regarding the institutional stay and other details.³⁴⁵ The National Agency for Correctional Institutions has also stressed that if the child is transferred to another institution the file should accompany him. If the child is placed in another institution temporarily, the order for placement and a copy of the most recent residential or treatment plan have to be sent along with the child, but not the complete file. This practical instruction is of significance for the continuity of the child's care, assistance and/or treatment. However, the YCIA Evaluation revealed that this instruction is not always followed.³⁴⁶

International Human Rights Standards stress the significance of personal files and records for safeguarding the child's right to protection against unlawful and arbitrary

³⁴⁴ YCIA Evaluation 2004, p. 157-158.

³⁴⁵ Art. 63 YCIA jo. 66ff YCIR and Letter of the Minister of Justice, October 2001 (5118030/01/DJI) regarding 'Subjects concerning the entry into force of the Youth Custodial Institutions Act'.

³⁴⁶ YCIA Evaluation 2004, p. 107-108 and 194.

treatment, including infringements of the child's privacy and physical integrity (see para. 3.8.5). The standards also stipulate that a file must be strictly confidential and that procedures regarding access of an appropriate third party and consultation on request must be established. The YCIA does not provide for such procedures, but the YCIR does, which justifies the question whether this should not have been regulated in the former statutory law rather than in the 'lower' YCIR. Article 68 YCIR provides that the child has the right of access to his own file and records. This includes that the child has the right to receive a copy of his residential or treatment plan and evaluation reports. The director can limit the child's access and deny access regarding certain details if necessary for the maintenance of the order and safety in the institution, for example if it is likely that the child will become aggressive or if it is required for the mental or physical development of the child, for the protection of the privacy of others who are not involved in the deprivation of liberty³⁴⁷ or for the enforcement of the residential or treatment plan. In such event, the director should either inform the child orally or he can grant access to the file by a person authorized by the child, for example his lawyer.³⁴⁸ The child does not have the right of access to documents that are not part of the file, but can be related to it, such as working notes.³⁴⁹ In light of the limitations on the value that a file can have for the investigation of unlawful or arbitrary treatment (i.e. those who maintain the file are often those who are responsible for the alleged unlawful treatment), the working notes can be of significant value. It would therefore be recommendable to provide for access to these notes as well.³⁵⁰

The child's parents have access to the child's file, unless this is against the child's interests or may invade the privacy of others, including staff members of the institution or other children.³⁵¹ In addition, a child of sixteen years or older must give permission, one of the few explicit recognitions of the child's evolving capacities. The probation office, Youth Care Agency and Child Care and Protection Board have access, if reasonably required for fulfilling their professional tasks. Furthermore, the Minister of Justice, selection official and institution's director have access if necessary to the handling of requests, procedures and other decisions regarding the child (art. 69 YCIR). Finally, the supervisory committee has access to the child's file and records, as far as reasonably necessary for the exercise of its task (art. 18 (2) YCIR).³⁵²

³⁴⁷ Cf art. 43 (b) of the Personal Data Protection Act which allows limitations if required by the interests of the investigation and prosecution of crimes.

³⁴⁸ Cf art. 43 (e) of the Personal Data Protection Act; Explanatory Memorandum YCIR, p. 71.

³⁴⁹ Explanatory Memorandum YCIR, p. 71.

³⁵⁰ According to art. 18 (2) YCIR the supervisory committee is entitled to have access to all relevant documents for the performance of their task. This would include working notes.

³⁵¹ Explanatory Memorandum YCIR, p. 71-72.

³⁵² Cf e.g. rule 58 (1) YCIR providing that if a child appeals a medical decision, the Medical Appeals Committee is entitled to access of the child's medical file.

In conclusion, the YCIA framework provides rules regarding files and access to files, although they are not embodied in statutory law. Furthermore, the limitation of the child's access can be understood, but must not be used too easily. If there are serious objections in light of the child's best interests, a limitation to the child's right to have access could be defended – a decision that the child should be allowed to remedy by filing complaints (see further para. 4.10). The other reasons for limitation should be assessed in light of the question what (specific) information in the child's personal file can put others than the child in danger or may be of relevance for the investigation or prosecution of criminal offences. Thus, the limitation of the child's right to access should be examined carefully and a full denial of access seems hard to defend and should be used rather restrictively. The same is true for access for professional authorities. Access must be granted only if strictly necessary and with full respect for the child's privacy and that of others. Moreover, regarding the parents of a child of sixteen or older the YCIR clearly represents an approach that takes into account the child's evolving capacities, one of the few explicit references in this regard.

However, neither the YCIA, nor the YCIR provides the right of the child to challenge the content of his file, although provided by International Human Rights Standards (art. 19 JDLs). In addition, it would be recommendable to include working notes as well, in order to guarantee 'a complete and secure record' (rule 21 JDLs).

4.7.6 Conclusion

This paragraph addressed the administrative aspects of deprivation of liberty in Dutch youth institutions. In general it is fair to conclude that a significant number of regulations can be found in either the YCIA or related administrative regulations, in particular the YCIR, covering many aspects that can be regarded of importance for the realization of the quality of treatment of children deprived of their liberty, required by International Human Rights Law and Standards. At the same time there are some serious omissions in both law and enforcement, which deserve further attention.

Regarding the central selection and placement it is important to stress that one gets the impression that efficient use of capacity has been of paramount consideration, rather than finding the most appropriate place for each individual child. This is for example visible in the wording of article 16 (1) YCIA, copied without adjustment from the adults laws, and in the adoption of article 16a YCIA. Despite an extensive list of criteria relevant to placement, there are few clear tensions that deserve constant attention, in particular the challenge to find the most appropriate placement in the vicinity of the habitual residence of the child. In addition, the lack of capacity addressed in paragraph 4.3 should not be neglected in this regard. Although, selection and placement is not an easy task, one should remain aware of the significance of appropriate selection and placement for the

realization of the objectives and safeguarding of the child's rights under International Human Rights Law and Standards. This stresses the need for clear and well-motivated decisions, directed towards the child; the YCIA does not explicitly oblige the authorities to do so, although the Appeals Committee has urged the selection official to be explicit in his decision (and reasoning) regarding prolongation of the term for placement of children under a treatment order in a treatment centre (art. 11 YCIA). In addition, the legal remedies to challenge these decisions and to make requests for transfer, provided by the YCIA are vital. The child's right to participate in the decision-making process requires further attention.

Upon admission the YCIA provides rules regarding the child's internal placement, although the institution's director has much discretion in this regard. In order to establish the appropriate placement and programme the child can be limited temporarily in his freedom of movement, a decision which is limited in time and must be made by the director – a decision which the child can remedy by filing a complaint.

Information for the child and his family upon arrival and during the child's stay is of eminent importance. The Dutch legislator has acknowledged this to a certain extent for children. Although it is fair to conclude that children in general are informed, there are some serious concerns regarding the providence of information towards children; both law and practice seem to underestimate the vast significance of the open and constant duty of communication between institution and child in this regard. In addition, the YCIA provides limited instructions about informing the child's family, including informing the family about the child's whereabouts and transfer. Despite some occasional reference in this regard, a clear integral approach cannot be found present. This deserves further attention.

Finally, the YCIA framework provides rules regarding files and access to files, although they are not embodied in statutory law. In essence, the child's right to have a personal file and access to this file have been acknowledged. There have been provided some lawful limitations, although this may not lead to a full denial of the child's access. The parents of the older child (i.e. sixteen and over) are dependent on the child's consent to have access to their child's file. Although the regulation as such is rather clear and well-designed, neither the YCIA, nor the YCIR provide the right of the child to challenge the content of his file, which is on strained terms with International Human Rights Standards. In addition, it would be recommendable to include working notes as well, in particular to increase the value of the file as an instrument to establish the truth, for example in case of allegations of ill-treatment.

4.8 CONDITIONS OF DEPRIVATION OF LIBERTY AND ENJOYMENT OF RIGHTS

4.8.1 Introduction

The YCIA provides the legal framework with detailed minimum requirements for a good quality of (the execution of) deprivation of liberty.³⁵³ The YCIA is a principles Act, which means that it provides the legal framework and minimum (substantive) guarantees that must be upheld in youth institutions. These guarantees have been elaborated in the YCIR and in ministerial regulations (see para. 4.5). This paragraph's main focus is on the YCIA and YCIR, and occasional reference will be made to the other regulations.

The elements addressed in this paragraph, such as housing, health and personal care, and the daily programme are relevant in light of the institution's responsibility to provide the child with an adequate standard of living and grant the child his (other) entitlements under the CRC. Contact with the family and the wider community, which will also be addressed below, is relevant in light of the child's right to maintain contact with his family (art. 37 (c) CRC) and for the realization of the objectives of juvenile justice (art. 40 (1) CRC).

However, minimum conditions of institutions are to a large extent determined by the developmental level of the country. Given the Dutch general standard of living, it does not surprise that the YCIA standards are high. In addition, there can be few excuses for not meeting these standards. This should be kept in mind in particular in this paragraph, because it otherwise may sound farfetched or unreal. Besides, it is important to reiterate that although the domestic level of development and available resources are significant for the implementation of economic, social and cultural rights (art. 4 CRC), there is no such link between resources and civil and political rights. In this regard, one should by interpreting this paragraph distinguish between the material elements of the quality of treatment of children in youth institutions (e.g. accommodation, food, health care or education³⁵⁴) and other elements such as the child's freedom from religion and right to maintain contact with his family and wider community.

Despite this one may expect from the legislator, within the boundaries of reasonableness, to set the standards not too low. The law can also be seen as a source of inspiration with standards one is determined to realize. Above all, there is no legitimate reason not to apply to children deprived of their liberty the same standards as other children in society.

³⁵³ Cf para. 3.9.

³⁵⁴ Under article 10 (1) ICCPR the HRC ruled that certain minimum conditions should be guaranteed, regardless of the developmental level of States Parties (see para. 3.9)

4.8.2 Housing, Accommodation and Physical Environment

In the Netherlands each child placed in a youth institution gets his own cell, which officially -and euphemistically – is called a room (art. 17 (2) YCIA). Group dorms or double bunks are not allowed; a principle that was under some pressure recently. In 2005 the Ministry of Justice started an experiment using rooms for more than one child. It was cancelled in the summer of 2006 due to the negative consequences for the well-being and safety of the children and the absence of substantive arguments to introduce a system allowing dorms throughout the country. The experiment was primarily based on efficiency arguments inspired by financial cutbacks. However, the then Minister of Justice concluded that the benefits could not compensate the efforts and costs of such a system.³⁵⁵ This was reiterated by the Minister in 2007, although he did not exclude a new attempt in the future. He stated there are no initiatives to experiment with placements of more than one child in a room ‘at this moment’.³⁵⁶

International Human Rights Standards do not exclude the use of dorms or double bunks (see para. 3.9). Boendermaker, Bruning & De Jonge concluded that the use of private rooms should be favoured. Dorms can only be used if this serves the interests of the child in a positive way, if his privacy is fully respected, if he is actively protected against ill-treatment, violence and aggression, and only if his needs are taken into account. In addition, the child and his representative should have the right to appeal against placement in a dorm. They clearly expressed doubt whether these interests and rights can be safeguarded in a system as experimented with.³⁵⁷

The principle of ‘a single room for every child’ should be seen in light of the fact that children in youth institutions stay in groups or participate in group activities for a minimum of twelve hours a day during the week and 8.5 hours a day during weekends (art. 22 YCIA; see below). If a child is not in a group or does not participate in daily activities he in principle stays in his room.

Requirements concerning the rooms are provided by the Ministerial Regulation regarding Requirements for Rooms in Youth institutions.³⁵⁸ The child’s room is a place where his private life takes place. It should therefore be a place which offers the child a minimum level of comfort and respects his privacy.³⁵⁹ A room must have

³⁵⁵ *Parliamentary Documents II* 2005/06, 29 815 en 24 587, no. 86; cf Boendermaker *et al.* 2006.

³⁵⁶ *Parliamentary Documents II* 2006/07, 29 815 and 24 587, no. 103.

³⁵⁷ Boendermaker, Bruning & De Jonge 2007, p. 36.

³⁵⁸ Ministerial Regulation regarding Requirements for Rooms in Youth institutions, 5113414/01/DJI, 14 August 2001, *Government Gazette* 2001, 156. This regulation is neither applicable to ‘(disciplinary) confinement cells’, nor to rooms in (semi-)open institutions; regarding the former there is a separate regulation, see para 4.9).

³⁵⁹ See clarification of the Ministerial Regulation regarding Requirements for Rooms in Youth institutions.

a minimal surface of ten square metres, a breadth of two metres and an elevation of 2.5 metres; a deviation of 10% is allowed (art. 3 of the Ministerial Regulation). Each room must have at least one window in an external wall with a minimal surface of 0.75 square metres (art. 4 *idem*).³⁶⁰ Furthermore, the room must have a door which can only be opened from the outside and it must have an intercom or alarm bell that can be used by the child to call a staff member at any time (art. 5 resp. 7 *idem*). The child must be able to control the heating in his room and a minimum temperature of 18° Celsius must be guaranteed, when the outside temperature is minus 10° Celsius and the wind speed is 10 metres per second. In addition, the room must be ventilated either naturally or mechanically (art. 6 *idem*). There must be sufficient light which can be controlled from inside (art. 8 *idem*).³⁶¹

Each room must have toilet, installed in a way that the child's privacy is guaranteed (i.e. not in sight of staff) and ventilated, and a washing facility (art. 9 *idem*). In addition, each room as a minimum must have: a mirror, a wardrobe, a table, a chair, a notice board, a bed and two sockets (art. 10 *idem*). Finally, each room must be in conformity with safety regulations, such as fire regulations.³⁶²

The regulations regarding youth institutions meet International Human Rights Standards. However, the regulation is silent on the sufficient and clean bedding requirement. Each room must be clean and without defects upon arrival. It may be assumed that the child must be enabled to keep his room clean. The regulation does not provide rules on this, but this can be considered part of the duty of care of the director, which will be addressed in the following paragraph.

4.8.3 *Personal Care and Health Care*

4.8.3.1 Introduction

The institution's director has a duty of care regarding all children placed in his institution. The two most significant elements are: personal care and health care. The YCIA also provides for social and spiritual care. The latter will be addressed under religion (para 4.8.5). Social care implies that the director has the duty to guarantee

³⁶⁰ A window is defined in art. 1 (b) as a provision which enables the child to experience the difference between day and night. According to the clarification of the regulation the former Youth Services and Youth Protection Inspectorate and the former Juvenile Custodial Advisory Board have argued that a window in the ceiling would not be acceptable, because it would deprive the child from any view.

³⁶¹ In addition, it can be controlled from outside; this can be combined with a system for night light.

³⁶² This issue has received particular attention since a devastating fire in the Schiphol (Amsterdam Airport) detention center in October 2005; 11 people were killed. The increased attention for fire regulations stretches to youth institutions as well. A number of institutions require(d) adjustments, which has led to a temporary decrease in capacity, including transfers of children to special units in adult institutions.

that social workers, probation officers and, in particular, behavioural experts are granted access to the institution to provide the child with the necessary care and assistance for his upbringing (art. 48 YCIA).³⁶³ This form of care has not been explicitly acknowledged by International Human Rights Standards. Under the YCIA it has been formulated as a right of the child and it should be seen as part of the institution's task as carer.

4.8.3.2 Personal Care

The director has a duty of personal care for children in his institution (art. 49 YCIA). This includes that the child must receive food – while respecting the child's religion or philosophy of life as much as possible (see also para. 4.8.5) – required clothing and shoes or sufficient financial resources to purchase such goods and that he must be enabled to take care of his personal physical hygiene and his appearance, 'within reasonable boundaries', according to the Minister of Justice.³⁶⁴ Hygiene includes the right to take a shower with warm water, even though neither the YCIA, nor other regulations provide for the minimum right to take a shower once a week.³⁶⁵

The child has the right to wear his own clothes and shoes, unless it puts the institution's order and safety at risk. This criterion must be interpreted strictly, which also implies that one may not divert from this principle as a general rule.³⁶⁶ However, a child can be forced to wear special clothing and shoes during activities or sports (art. 49 (2) YCIA). The internal rules can provide rules regarding the maintenance of clothing.

The rules can also regulate the purchase of consumer articles. In this regard each child receives some pocket money.³⁶⁷ This is not a right of the child; it can be granted to the child instead. Since cash money is prohibited, the pocket money will be stored in an account (art. 51 YCIA). *De facto*, payments for, for example a telephone card, will be transferred through the group leaders.

³⁶³ Explanatory Memorandum YCIA, p. 58. If required, the director must arrange the child's transfer to a place where he can receive the necessary care and assistance.

³⁶⁴ Explanatory Memorandum YCIA, p. 78.

³⁶⁵ Appeals Committee, 29 January 2003, 02/2071/JA. In this case a child filed a complaint about the lack of an adequate warm water provision. With reference to the director's duty of care and the institution's internal rules, which embodied the rules regarding the hours for showering, the Appeals Committee ruled that the child has the right to take a shower (in this case on a daily basis), which includes a shower with warm water.

³⁶⁶ Appeals Committee, 8 October 2002, 02/1685/JA. In this case a child was forced to wear the same governmental clothing during school, due to maintenance of order, clear organization and a workable situation. The Appeals Committee ruled that this violated the law, because a child can only be obliged to wear other clothes than his own if there is a real threat to the order of safety in the institution.

³⁶⁷ Ministerial Regulation Pocket Money for Juveniles, 5113413/01/DJI, 14 August 2001, *Government Gazette* 2001, 156. In September 2001 this was €1.26 per day, in 2008 €1.40.

The director can allow a child to possess personal effects while he stays in the institution. Although International Human Rights Standards regard personal effects as ‘a basic element of the right to privacy and essential to the psychological well-being of the juvenile’ (rule 35 JDLs), the YCIA makes the possession dependent on the director’s permission. It is at the director’s discretion to permit the possession of effects, if these are not prohibited by the internal rules and if they are compatible with the order and safety in the institution,³⁶⁸ the mental or physical development of the child, the enforcement of the residential or treatment plan or the director’s liability for the effects (art. 50(2) YCIA).³⁶⁹

This provision makes the possession of effects as part of the child’s privacy depending on the director’s permission. One could raise the question whether the Dutch legislator has chosen the rightful approach in this regard. It is arguably more in conformity with International Human Rights Law if the child is entitled to possess (i.e. to keep) his personal effects, unless the director finds reason to limit this entitlement for reasons provided by statutory law. These reasons as such must be required by the special condition the child is in. The above mentioned grounds seem legitimate, except arguably the ground related to the director’s liability.

Finally, each child has the right to enjoy fresh air on a daily basis (art. 53 (3) YCIA). The director has the positive obligation to guarantee this for at least one hour a day (art. 53 (4) YCIA). This right is regarded of great importance and in general is a group activity. If a child is placed in confinement (see para. 4.9), he remains entitled to this right, although the enforcement will take place on an individual basis.³⁷⁰ Despite its significance the right to fresh air is not absolute; it may not be enforced if it is against the child’s health interests. In addition, the child should exercise his

³⁶⁸ This includes public morality, which enables ‘limitation of the possession and distribution of far going expressions of pornography’; Explanatory Memorandum YCIA, p. 78.

³⁶⁹ The Minister of Justice expressed the expectation that *de facto* mostly arguments of an organizational nature will provide a ground for limitation, such as clarity of the rooms and group homes, maintenance of order or transportation. The Minister expected that the manageability could be at stake, e.g. if effects provoke other children. Other grounds are health of the child or others, including personnel, due to possession of pets, plants, etc. The director’s liability is a legitimate ground as well, according to the Minister. The liability clause implies that the director can reject effects for which he does not want to be held liable, in the event that a staff member causes damage (e.g. if effects are extremely expensive); Explanatory Memorandum YCIA, p. 78-79. The director can also impose conditions on the acceptance regarding the use of effects and is entitled to inspect the personal effects in order to determine whether they are or should be prohibited. Subsequently, he can confiscate effects and keep them in custody (after providing a receipt), or destroy it with the child’s consent or hand it over to the investigating officer if necessary for the prevention or prosecution of a (alleged) crime; art. 50 (3)-(5) YCIA.

³⁷⁰ Confinement cells often have separate ‘outdoor facilities’.

right in a way, which enables a proper enforcement of this right³⁷¹ and the enjoyment can be denied if its enforcement would be irresponsible under the specific circumstances, for example given the child's mental status and the required infringements of his physical integrity in order to let him exercise his right.³⁷²

4.8.3.3 Health Care

The child has the right to health care provided by a doctor affiliated to the institution (art. 47 YCIA). The director must guarantee that a doctor holds consulting hours regularly and is available if required by the child's health. In addition, the director must guarantee that the doctor checks the child's suitability to participate in sports or activities. Subsequently, the director has the obligation to supply medication and to facilitate diets prescribed by the doctor, the child's treatment if instructed by the doctor and if necessary the child's transportation to a hospital or other facility.³⁷³

Medical treatment is governed by the Medical Treatment Contracts Act ('Wet op de geneeskundige behandelingsovereenkomst'). No child can be treated against his will or his parents' will, which includes treatment through medicines. The Medical Treatment Contracts Act provides that if the child is under the age of twelve medical treatment requires the consent of his parents. If a child is between twelve and sixteen both he and his parents have to consent. Finally, if a child is sixteen or older only his permission (consent) is required for medical treatment because children of this age are under the Medical Treatment Contracts Act considered adults.³⁷⁴

371 Appeals Committee, 5 August 2003, 03/0859/JA. In this case a child misbehaved during his 'fresh air hour'. The director placed the child in his room and did not grant him the rest of his 'fresh air hour' later. The Appeals Committee judged this decision neither unlawful, nor unreasonable or inequitable. The refusal of (parts of) one hour in fresh air cannot be used as a disciplinary measure. That would be unlawful, according to the Appeals Committee.

372 Appeals Committee, 6 January 2003, 02/2087/JA. In this case the Appeals Committee approved that the director denied the child's request for fresh air, because granting this request would (given the child's mental status: he was unruly, which was also the reason for isolation) require supervision of a large number of staff and only with handcuffs.

373 If placement in a psychiatric hospital is required, the National Agency for Correctional Institutions should arrange the transfer, while taking into account the law that administers forced placements in psychiatric hospitals, the Psychiatric Hospitals (Compulsory Admissions) Act (art. 16 (6) YCIA).

374 Arts. 7:450 and 447 Civil Code; cf Explanatory Memorandum YCIA, p. 48. If the child (12 to 16 years old) and his parents do not agree with each other, the doctor still can provide the treatment if necessary for the prevention of 'serious disadvantage' for the child or if the child continuously expresses his wish to be medically treated in a well-considered way. In addition, every doctor has the duty to act in conformity with his duty and responsibility to be a good and professional care and assistance provider, which implies that he has the discretion to divert from the express wishes of either the child or his parents (art. 7:453 Civil Code). The YCIA permits forced medical treatment under art. 37 YCIA (see below in para. 3.9)

The Minister of Justice has argued that he expects that each institution has a general practitioner, a dentist and a psychiatrist.³⁷⁵ The general practitioner performs ‘a pivotal function’; he is attending doctor, but also inspecting doctor and consulting doctor for the institution’s administration. This may cause a conflict of interests. The Minister has acknowledged this and pointed particularly at the situation in which the doctor is requested to act regarding inspection or coercive measures against the child’s will, such as body searches or forced medication (arts. 36 and 37 YCIA; see para. 4.9). This can be on strained terms with the confidential relation he has with the child as his patient. In such situation the institution’s administration should favour the use of doctors from the local community instead. Obviously, the instruction is of limited value in the case of emergency. According to the Minister such a situation may require the institution’s doctor to perform the requested medical checks and tasks, despite his confidential relation with the child.³⁷⁶ This conflict of interests however could be less complicated if the child is entitled to consult a general practitioner from the community – a different approach than the YCIA, but arguably fitting better the JDLs’ principle of integration of the institution in the community as well. The institution’s medical officer then performs only those tasks leading to infringement of the child’s privacy and physical integrity against his will.

The child has the right to consult the doctor of his choice. The director must facilitate the consultation and arrange a meeting between the child and the requested doctor. The child has the right to consultation only. Otherwise it could interfere negatively with the medical policy of the institution’s doctor. The child is responsible for the costs of this consultation.³⁷⁷

Finally, the child has the opportunity to appeal against medical decisions. The YCIA does not provide for this, but the YCIR does in article 55ff (see further para. 4.10).³⁷⁸

In light of the international human rights framework there are a few of remarks that should be made. First, the YCIA stands for a health care system primarily administered by the institution. As mentioned above this is a different approach than the JDLs proclaim. According to the JDLs, medical care should be provided through the appropriate health facilities and services of the community in which the facility is located, in order ‘to prevent stigmatization (...) and promote self-respect and

³⁷⁵ This should arguably be a youth psychiatrist. *De facto* there is a shortage of youth psychiatrists; see, e.g. *Parliamentary Documents II* 2006/07, 29 815 and 24 587, no. 103, p. 4-5.

³⁷⁶ Explanatory Memorandum YCIA, p. 57-58. They can also be considered a doctor affiliated to the institution under art. 47 YCIA.

³⁷⁷ The Minister has expressed its expectation that the consulted doctor will contact the institution’s doctor if certain treatment is required; Explanatory Memorandum YCIA, p. 58.

³⁷⁸ Each doctor, psychiatrist or clinical psychologist should be registered under the Individual Healthcare Professions Act (‘Wet op de beroepen in de individuele gezondheidszorg (Wet BIG)’) and falls under his own professional code; Explanatory Memorandum YCIA, p. 25.

integration into the community' (rule 49 JDLs). Although the JDLs may to some extent be unrealistic and not appropriate for instance in closed institutions, the YCIA does not provide for a very strong link with the community, although at the same time the participation of community health care services is not fully excluded.

Second, the YCIA does not provide explicitly for a medical checkup upon admission (see also para. 4.7). The director should consult the institution's doctor regarding a number of decisions, but the YCIA does not provide for any other preventive assessment. This omission could be defended by the rather well organized Dutch health care system of high standard, but a medical check still is significant for example to be able to examine allegations of ill-treatment, resulting for instance in injuries that have been inflicted during the child's stay in the institution (see paras. 3.6 and 3.9).

Furthermore, neither the YCIA nor the 'lower' administrative regulations provide detailed guidance on the administration of medication, while this is of importance for safeguarding the child's right to health care and preventing unlawful medical treatment. According to article 47 (4) (a) YCIA the director has the responsibility to provide the required medication, prescribed by the doctor. Since this has been formulated in this broad but firm wording, it may be assumed that the director is also responsible for the administration and quality of the medication. Finally, the YCIA does not explicitly acknowledge that there may be children who cannot understand and/or speak the Dutch language; it does for example not provide for assistance of an interpreter when communicating with the doctor.³⁷⁹

Despite these omissions, it is fair to conclude that YCIA acknowledges the child's right to health care, while taking into account the child's evolving capacities. The YCIA attributes an important role to the institution's director and leaves him much discretion.³⁸⁰ Furthermore, the YCIA seems to represent an institutional approach rather than an approach which fosters community involvement (as recommended by the JDLs). The only explicit reference to medical care and assistance from the community (in the event of conflict of interests regarding the role of the medical staff) can lead to practical complications. The question whether the YCIA and other regulations effectively guarantees the right to health care is difficult to answer. Given the high standard of health care in the Netherlands there is no room for not safeguarding children in institutions 'the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and

379 Only if a child exercises his right to appeal against medical decisions is he entitled to the assistance of an interpreter (art. 58 (9) YCIR).

380 The Council observed in 2004 that in general children have access to health care and they are satisfied with the care provided; Annual Report The Council 2004, *Omgaan met verandering. Een nieuwe (in)richting in sanctietoepassing en jeugdzorg?*, The Hague (Annual Report The Council 2004), p. 16.

rehabilitation of health' (art. 24 CRC). The (continued) shortage of youth psychiatrists is hard to defend in this regard.

4.8.4. Education, Training and Leisure/Recreation

4.8.4.1 Introduction

Each child deprived of his liberty remains entitled to education, vocational training, leisure and recreation, entitlements which are of significance for the child's development and (continuity of his) upbringing. In addition, the enjoyment of these rights is important for the child's reintegration into society where it can play a constructive role. Consequently, each institution should offer a daily programme enshrining education and training, but also moments for relaxation and leisure, including sports, arts and crafts. By offering such programmes one can avoid the child spending most of the time confined in a private cell or dorm, which is regarded as detrimental to the realization of the just mentioned objectives (see para. 3.9.4). This paragraph addresses the different components of the daily programme in youth institutions as laid down in the YCIA.

As mentioned before, children in youth institutions stay in groups during the day and participate in group activities. The YCIA provides for a minimum set of activities, which can be divided into education, general education, sports, leisure and recreational activities. According to the Minister of Justice the extent and content of the activities is dependent on the institution's designated use and population, length of stay of children and security level.³⁸¹

4.8.4.2 Staying in Groups or Participating in Group Activities

As highlighted occasionally above, one of the core principles of youth institutions is that children should stay in groups and participate in group activities during the day. Children stay in groups or participate in group activities for a minimum of twelve hours a day during the week and 8.5 hours a day during weekends (art. 22 YCIA). If a child is not in a group or does not participate in activities he ought to stay in his room (i.e. at least during the night). A 'group' consists of at least three children (art. 1 (v) YCIA; in units for intensive treatment or assistance the minimum is two; art. 22a (4) and 22b (4) YCIA). *De facto*, a group in a remand home consists of twelve children – a group in a treatment centre ten.³⁸² The idea of a 'group system' dates from the beginning of the 20th Century (1901 Child Laws), although it was then poorly enforced.³⁸³

³⁸¹ Explanatory Memorandum YCIA, p. 58-59.

³⁸² Efforts are made to decrease the number of children in a group; *Parliamentary Documents II* 2006/07, 29 815 and 24 587, no. 103, p. 5.

³⁸³ Weijers & Liefwaard 2007, p. 136-137.

According to the Minister of Justice the group-based approach implies that a child interacts with other children constantly. It affects joint parts of the daily programme, such as education and sports activities, but also leisure and dinner. According to the Minister the principle is important because social processes are vital for the child's personality development. One should try to create living conditions as normal as possible, in particular because the child finds himself in a vulnerable phase of the development of his personality. Consequently, institution staff consist of group leaders with specific knowledge and skills, required for the realization of the objectives of the stay in the institution (*cf* para. 4.11).³⁸⁴ In addition, youth institutions are designed accordingly; there are group homes and attached corridors with individual rooms. Most of the group homes have a kitchen, a dining room and a recreational room.

The principle's central position and rather firm embodiment in the YCIA has a few legal consequences. First, the principle can be considered a right of the child. Based on article 22 YCIA he is entitled to stay in the group or to participate in group activities for the minimum duration of twelve (or 8.5) hours a day. In this regard the Minister of Justice has stressed, however, that if the child does not wish to participate in group activities, he does not have the right to stay in the group. As a consequence the child may be confined to his room.³⁸⁵ If confinement to a room lasts longer than twelve hours (during the week) an explicit decision to that effect is required (also if the child himself does not want to stay in the group; see below).³⁸⁶

Thus, the principle is not only meant to serve the child's pedagogical or social interests, but also to limit infringements of his freedom of movement (or further deprivation of liberty) as a rule. In other words, it is also clearly meant to serve the child's legal status.

As a consequence of this approach, all exceptions to the principle that a child stays in the group (or participates in group activities) have to be formalized. An example is the admission programme addressed in paragraph 4.7; other examples are measures of order or disciplinary sanctions (see below para. 4.9).³⁸⁷ The right of the child to stay in the group is formulated in such a strong and rigid way that it limits his freedom of movement in the sense that he is not allowed to go to his room if he wishes to, for instance for privacy motives. For example, if the child would like to

³⁸⁴ Explanatory Memorandum YCIA, p. 33.

³⁸⁵ Explanatory Memorandum YCIA, p. 34. The Appeals Committee has ruled that visits must not be seen as joint activities and that if there are no visitors for the child, he remains entitled to stay in the group. The placement of the child in his room will then constitute a violation of art. 22 YCIA; Appeals Committee, 23 May 2002, 02/0496/JA.

³⁸⁶ A decision which can be remedied by the child; see para. 4.10.

³⁸⁷ See also art. 23 (3) YCIA, providing that a child can participate in an adjusted programme for one week (with prolongation if necessary), requiring an explicit decision from the director.

go to his room and stay there for a while, he should theoretically make a request based on article 24 YCIA (regulating measures to restore order). The YCIA Evaluation revealed that institutions, although they generally agreed on the principle, pointed at their difficulties to meet the strict requirements of the principle, in particular in situations of staffing problems, but also due to other legislation, such as the Working Hours Act, safety regulations and Working Conditions Act 1998.³⁸⁸ Nevertheless, almost all institutions explained that they were able to meet the minimum duration set by the YCIA.³⁸⁹

More recent signals show more or less the same results, although the institutions have shown more difficulties in meeting the twelve hours group stay and activities during the week and 8.5 hours during the weekend. Structural staffing problems of some institutions seem to be the main reason for these difficulties.³⁹⁰ The Appeals Committee has ruled in a number of cases that the institutions must uphold the principle even if there are structural low staffing levels. The cases show that children were placed in their rooms and as a result stayed fewer hours in the group than prescribed by the law.³⁹¹

Despite these practical complications,³⁹² it is important that the child has the right not to be locked up in his cell for 23 hours, but to stay in the group during the daytime. The fact that diversion from this general principle has been formalized

³⁸⁸ E.g. during shifts of staff safety regulations would not allow the child to stay in the group. Therefore children were placed in their rooms for an hour, which could result in not meeting the minimum of twelve hours.

³⁸⁹ YCIA Evaluation, p. 151-152.

³⁹⁰ In the period 1999-2001 the overall absenteeism rate was 10.8%, in 2002 it was 9.5% (compared to the 7% in general across the central government, the absenteeism rate can be considered high); YCIA Evaluation, p. 90-91; the rate was lower in the years 2003-2005; DJI Overview Figures Annual Reports 2003, 2004 and 2005; Cf Annual Report The Council 2005, *Veilig samen leven*, The Hague (Annual Report The Council 2005), p. 21 and Annual Report The Council 2003, The Hague, p. 25. Cf para. 4.12.

³⁹¹ According to the jurisprudence of the Appeals Committee each child who's rights are violated in this regard is entitled to financial compensation; Appeals Committee, 8 April 2002, 02/0079/JA (and 02/0078/JA, 02/0080/JA and 02/0081/JA). The compensation is €2.50 per day, regardless of the severity of the breach (i.e. period of time that the child must stay in his room instead in the group); cf Appeals Committee, 2 July 2003, 03/0684/JA (and 03/0683/JA), Appeals Committee, 13 July 2004, 04/0749/JA and Appeals Committee, 5 January 2005, 04/2733/JA. In the event of an incidental low staffing level, for example in the event of unforeseen circumstances or coincidence, there is no right to compensation; Appeals Committee, 1 September 2003, 03/0721/JA and Appeals Committee, 6 January 2003, 02/2087/JA. Moreover, the time that the child had to stay too long in his room should not be too short, it should be substantial. One could argue, based on the jurisprudence, that the minimum duration for substantial is 45 minutes; Appeals Committee, 6 February 2004, 03/2676/JA. Based on the figures regarding the right to complain about violation of the right to stay in the group is one of the main reasons for children to file complaints; see para. 4.10.

³⁹² Also caused by severe financial cutbacks as acknowledged by the Minister of Justice; Explanatory Memorandum YCIA, p. 33.

rather rigidly must be taken seriously, but the principle as such is considered too significant (as a legal safeguard against isolation) to be set aside too easily.

4.8.4.3 Education

According to article 28 CRC the Dutch government has the positive obligation to provide education for children (see also art. 23 of the Dutch Constitution). This positive obligation stretches to children deprived of their liberty as well (*cf* rule 38 JDLs).

Based on article 52 YCIA education is compulsory for each child in the institution; education that, according to the Explanatory Memorandum, must aim at the full development of the child's personality, his talents and his mental and physical capacities.³⁹³ Each child, regardless of his age,³⁹⁴ is obliged to either go to school or to participate in activities designed for educational purposes. Article 52 YCIA also provides instructions for the institution's director to provide education. The child's educational programme must be part of his residential or treatment plan, while taking into account the institution's level of security and the child's personal wishes and those of his parents or caretakers. The objectives can thus vary based upon the objectives of the residential and treatment plan, which provides for guidance (art. 63 (3) YCIR).

Children in (semi-)open institutions can be allowed to go to school in the community. Closed youth institutions have educational facilities (a school) inside their buildings. Since a legislative change on 1 January 2003,³⁹⁵ aiming at improvement of the quality of education in State institutions, education in all youth institutions has been generally provided by (secondary) schools for (severely) maladjusted children ('voortgezet speciaal onderwijs voor zeer moeilijk opvoedbare kinderen (VSO-ZMOK)'), from the immediate vicinity of the institution.³⁹⁶ Moreover, all institutions would offer the same educational programmes as the schools in the region, which would enable the child's transition back and forth. This requires a narrow co-operation between schools and youth institutions on the basis of a special agreement.³⁹⁷

³⁹³ Explanatory Memorandum YCIA, p. 59 with explicit reference to art. 29 (1) (a) CRC.

³⁹⁴ Children's ages can vary from under twelve years up to the mid-twenties, while the national compulsory school age (as referred to by rule 38 JDLs) is set from 5 until 15; 16 and 17 year old children remain under the obligation to attend school if they have no qualification yet; arts. 3 and 4a Compulsory Education Act 1969 (Act of 30 May 1968, Bulletin of Acts and Decrees 1975, 393).

³⁹⁵ Due to a revision of Expertise Centres Act ('Wet op de Expertise Centra').

³⁹⁶ Beforehand there was a distinction between private youth institutions, which already fell under the Expertise Centres Act (art. 62 (1) YCIR) and State youth institutions, that fell under art. 62 (2)ff YCIA.

³⁹⁷ Hover 2004, p. 5.

4.8.4.4 Evaluation of Education in Youth Institutions

The recent legislative change was evaluated in 2004. The evaluation shows that it was implemented rather well and that it generally had a positive effect on the quality of the education and personnel, although the quality still requires improvement.³⁹⁸ In addition, more attention must be given to the child's level of education and his eventual reintegration. In this regard a number of problems were discovered.³⁹⁹ For example, the level of education practised in youth institutions (schools for (severely) maladjusted children provide a similar education programme) leaves no room for alternative (i.e. higher) levels of education and some children are not obliged to participate under the Compulsory Education Act 1969 and may be better served with a alternative educational level.⁴⁰⁰

Another example affects deregistration from school when the child leaves the institution. The evaluation points to the fact that some children are better served with a continuation of their education or vocational training and should not be deregistered automatically; they would be better off if they were offered to continue their educational programme in the same school within that region (provided that they reintegrate there). A similar problem occurs when a child is placed in a remand home (e.g. in pre-trial detention), which automatically implies that he is registered in the school affiliated to the institution and that he is deregistered from his old school.⁴⁰¹ This may unnecessarily cause problems (i.e. block the continuation of his education) if the child stays in the institution for a relatively short period.

The evaluation furthermore reiterates a few conclusions from the YCIA Evaluation, such as the tension between the Expertise Centres Act and the YCIA, in particular regarding the discretion of the teaching staff, as employees of the regional school and the institution's administration, and the question whether the YCIA leaves enough room for a pedagogical approach or not, which requires further research.⁴⁰²

The evaluation provides a number of other conclusions and recommendations. First, it recommends the introduction of a more flexible educational programme. The expertise of education for (severely) maladjusted children is desirable, but the schools affiliated to youth institutions should be enabled to offer a broader

³⁹⁸ Hover 2004, p. 7 and 27ff.

³⁹⁹ Hover 2004, p. 9-10.

⁴⁰⁰ Cf Annual Report The Council 2005, p. 21 and Annual Report The Council 2004, p. 16.

⁴⁰¹ Provided that the child attended school, which is not necessarily so.

⁴⁰² Hover 2004, p. 11. The education evaluation furthermore stresses that even though education is provided by a school from outside the institution, all changes affecting youth institutions will also have impact on the schools that operate within the institution, their staff and programmes. In other words, one should constantly take into account what effect changes regarding institutions may have for the education provided by the (external) school; Hover 2004, p. 12 and 29-30.

programme, which can be adjusted to the specific needs of each child.⁴⁰³ The Education Inspectorate found that the quality of the educational programme needs improvement.⁴⁰⁴

Another issue is that the general scheme of schools, including a long summer holiday (six to seven weeks), may be problematic for the daily programme of youth institutions. During the long summer holiday, youth institutions provide an activity programme.⁴⁰⁵ According to the evaluation both institutions and schools stressed that a longer scheme (i.e. without such a big interruption) is favourable, especially for remand homes where children may stay for such a short period of time, that if they happen to arrive during the summer holiday they may very well receive no education at all (i.e. they have already left before school resumes).

However, the alternative of less education a day and a combination of education and an additional programme instead, is considered not a realistic alternative for institutions. The schools' approach is that two separate schemes, one for the institution and one for the regular regional location of the school, confronts them with difficulties regarding, for example the shifting of staff. The evaluation concludes that staff's objections against a different (longer) institutional scheme had been decisive.⁴⁰⁶

According to the evaluation it is regrettable that the 'regular holiday scheme' is applicable to youth institutions, while article 26 Expertise Centres Act allows a more flexible approach. In addition, an extension of the number of educational hours for institutions is unlikely, taking into account the costs and the 'repercussions for the rest of the special education'.⁴⁰⁷

⁴⁰³ Hover 2004, p. 28, recommendation 13. The National Ombudsman concluded similarly in 2004. He argued that the educational level in remand homes left too little room for differentiation, although treatment centres were capable of providing a more diverse offer. The National Ombudsman expressed his concerns regarding the waiting lists due to which children stay in remand homes for long periods of time before transfer to a treatment centre, as a result of which they remain deprived of a more diverse educational offer; National Ombudsman 2004, p. 48-52. The experts consulted by the ombudsman were remarkably negative about (the level of) education in youth institutions; National Ombudsman 2004, p. 50 and 135-136. It is interesting to note that the evaluation expresses the expectation that the termination of the placement of children under the juvenile justice system and under the child protection in the same institution, will probably lead to less efficient groups; Hover 2004, p. 30.

⁴⁰⁴ In addition, the inspection of quality needs improvement as well, for example through more care for quality; Hover 2004, p. 29.

⁴⁰⁵ Hover 2004, p. 25-26. According to Junger-Tas many institutions do not provide adequate alternative programmes; National Ombudsman 2004, p. 50 and 135.

⁴⁰⁶ Hover 2004, p. 26.

⁴⁰⁷ The Ministry of Education will have to approve this. On the other hand 'one may wonder whether a different approach is needed, taking into account the learning objectives, and feasible, taking into account (...) the population'; Hover 2004, p. 26.

Regardless of the answers to this question, there are two remarks that must be made. If – as a principle – a compulsory educational programme should be part of the institutional daily programme, by law (i.e. YCIA), one should not give up such a principle too easily, due to practical reasons. Second, this discussion can be seen as an example of what happens if two different Ministries are responsible and two different systems come together in one setting (i.e. institutional care).

The evaluation furthermore points out that non-attendance and cancelled lessons happen regularly. Non-attendance often is caused by disciplinary measures⁴⁰⁸ or measures of an organizational nature taken by the institution's administration, such as visits from parents or lawyers, court visits or treatment programmes. There also is much unauthorized absenteeism. Cancelled lessons are *inter alia* caused by a lack of personnel. According to the evaluation this requires more financial input and improved cooperation with the institution. Cancelled lessons cause institutional problems if the child (or group) is sent back to his group at once. A similar problem exists if the child is sent away, which should therefore be avoided as much as possible. Youth institutions and schools should make clear agreements in this regard.⁴⁰⁹

Finally, the evaluation showed that two different complaints procedures are applicable: the procedure under the YCIA, which should be paramount according to the Appeals Committee⁴¹⁰ and the procedure under the Expertise Centres Act, which, as recommended in the evaluation, should not be set aside too easily. It is argued that the majority of schools find the YCIA complaints procedure too formalistic and inadequate from a pedagogical point of view.⁴¹¹ The YCIA procedure is merely a legal remedy for violations of his rights, while the complaints procedure under the Expertise Centres Act should be used as a tool for a pedagogical approach, to have discussion and debate, which preferably avoids the filing of formal complaints. In addition, it is recommended to acknowledge the schools' own complaints procedure and that schools and institutions should agree upon their reciprocal participation in the procedure. Furthermore, they should exchange annual reports of their complaints committees.⁴¹² It is however questionable whether the comparison used in the evaluation is accurate. First, the Appeals Committee approach seems to be defensible, that is that the complaints procedure of the YCIA should be paramount; the YCIA complaints procedure has a broad scope and the director's responsibility is large, including the education provided inside the institution or outside as part of the

408 A disciplinary sanction that leads to absence at school is regarded as undesirable; Hover 2004, p. 31.

409 Hover 2004, p. 31.

410 Appeals Committee, 6 August 2003, 03/0758/JA.

411 See also the YCIA Evaluation 2004.

412 Hover 2004, p. 33-34.

institutional programme. Second, the YCIA procedure can also be used as a pedagogical instrument, in particular through the mediation procedure (see further para. 4.10).⁴¹³

In conclusion, education in youth institutions has a significant position (represented by the fact that it is compulsory for each child) and it should be tailor-made, while taking into account the desires of child and parents. At the same time one should be critical regarding the educational level and regarding the realization of the tailor-made approach, in particular if one takes into account that the general level is the level for (severely) maladjusted children, leaving little room for other levels of education (particularly in remand homes).⁴¹⁴

The evaluation of the recent legislative change has concluded that there is a number of good initial results, in particular the establishment of a strong connection with the community through inviting community schools to provide education inside and outside the institution. This approach can have positive implications, such as the fostering of the child's transition between institutional life and life in society. Moreover, it fits the community approach proclaimed by the JDLs. However, a number of issues have to be addressed first, before one can be really supportive regarding this approach in practice.⁴¹⁵

4.8.4.5 Training, Work, Leisure/Recreation and Sports

The YCIA does not explicitly provide for work or vocational training. However, this could be considered part of education (*cf* art. 62 (2) YCIR), which also stresses the need for an educational added value if the child works or participates in vocational training. This excludes hard, forced and/or exploitative labour.

Furthermore, article 53 YCIA provides that children have the right to follow the news and to visit the library on a weekly basis. In addition, each child has the right to leisure or recreational activities, which implies that the director has the obligation to guarantee at least two recreational hours a day (art. 53 (3) YCIA). One can think of watching television or movies, playing a game or reading a book or magazine. It can also imply that the child should participate in group recreational activities.⁴¹⁶ The YCIA also provides the right of a minimum of two 45-minute sessions of sports

413 Furthermore, using another complaints procedure will eventually lead to confusion. Moreover, dispute resolution should in the first place be a matter of non-legal remedies (also if the school complaint system were to be preferred).

414 Furthermore, there is no explicit reference to children who cannot understand the Dutch language.

415 The Council confirmed a number of conclusions from the evaluation in its 2005 Annual Report; Annual Report The Council 2005, p. 21.

416 It can also be combined with the enforcement of the child's right to enjoy fresh air daily for at least one hour.

and physical exercise per week (art. 53 YCIA). Both sports and recreation should only be exercised if this is not against the child's health interests.⁴¹⁷

Although the YCIA does explicitly provide for this, the right to recreation and sports includes the fact that if the child is not capable of participating for instance due to physical limitations he should receive assistance or even remedial physical education and therapy, under medical supervision (rule 47 JDLs). These children should by no means be denied recreation or sports as it would be against their health interests *per se*.

4.8.5 Religion

The child's freedom of religion (*cf* art. 14 CRC's freedom of thought, conscience and religion) must be respected during the entire deprivation of liberty. This fundamental freedom has been acknowledged in article 6 of the Dutch Constitution. In addition, article 46 YCIA explicitly provides the right of the child to exercise his religion or personal beliefs freely and individually or together with others. It also places the director under the positive obligation to facilitate the child's enjoyment of this right, through providing for adequate spiritual care, which must meet the spiritual needs as much as possible. This leaves some room, but cannot imply that the child is entirely deprived of his freedom of religion. The director must enable the child to have private contact either with a spiritual caretaker representing the religion of his choice, affiliated to the institution⁴¹⁸ or through the reception of visits. Furthermore, the child must be enabled to attend services, all at hours provided by the internal rules.

Respect for the child's religion and personal beliefs must also be taken into account by the director (under his duty of care; see para. 4.8.3) regarding religion-related (or: prescribed) food and clothing.⁴¹⁹

4.8.6 Contact with the Family and the Wider Community

4.8.6.1 Introduction

The right to maintain contact with family is one of the core rights of every child deprived of his liberty (art. 37 (c) CRC). Together with the right to keep contact

⁴¹⁷ See above for the medical check built into art. 47 (3) (c) YCIA.

⁴¹⁸ Art. 51 YCIR provides that as a minimum, representatives of the protestant or catholic religion and of the Dutch Humanist League must be available. The YCIR does not explicitly provide for the presence of an imam, although *de facto*, many institutions have an imam available. The YCIR does not mention other religions either.

⁴¹⁹ See in this regard Appeals Committee, 9 March 2005, 05/0240/JA, in which the Appeals Committee ruled that the director violated his duty of care by not waking up the child and serving him food before sunrise during the Ramadan.

with the wider community (see JDLs), it is of vital importance for the realization of the objectives of juvenile justice, in particular the child's reintegration. In addition, the right is prompted by the child's right to be treated in a manner that respects his privacy and family life.⁴²⁰

This right to maintain contact with the family is not absolute. In exceptional circumstances the right can be limited, implying that limitations must be required by the child's best interests, for example to avoid that the child will be exposed to hazardous influences (see para. 3.9). Moreover, exceptional circumstances 'should be clearly described in the law and not left to the discretion of the competent authorities' (GC No 10, para. 87). In light of this it is of the utmost importance to provide the child with effective remedies to challenge such a limitation.

This paragraph explores the legal possibilities for children in Dutch youth institutions to keep contact with their families and the wider community. It is fair to say that the Dutch legislator has acknowledged the significance of (mutual) contact between the child, his family and the community. In addition, the Appeals Committee has emphasized the particular importance of the right of the child to maintain contact with his family.⁴²¹

The YCIA contains a comprehensive set of provisions regarding correspondence, through mail and the telephone, and visits. These provisions also affect the level of transparency of institutions, since they include rules regarding visits from inspection and monitoring authorities and contact with the (mass) media. Furthermore, there are provisions regarding leave arrangements that are of significance in this regard as well.⁴²²

4.8.6.2 Contact with the Wider Community – Some General Remarks

Under the YCIA each child is entitled to contact with the wider community through mail, telephone calls and receiving visits. In addition, the director can allow the child to have contact with the media. The wider community includes more than just family or parents, although the child's parents⁴²³ have a special position, as 'privileged persons' (art. 42 YCIA). Other privileged persons are *inter alia* the child's lawyer, probation officer or family supervisor and representatives of *inter alia* the Council for the Administration of Criminal Justice and Youth Protection, Youth Care Inspectorate, Health Care Inspectorate and the institution's supervisory

420 Cf also art. 37 (d) CRC which stipulates that each child is entitled to legal *and* other appropriate assistance; see para. 4.4.

421 Appeals Committee, 11 August 2004, 04/0842/JA.

422 For provisions regarding contact between child and family during police custody see para. 4.5.

423 Including the child's legal guardian, stepparents or foster parents.

committee.⁴²⁴ Many of these individuals or representatives have this privileged status in order to enable inspection and monitoring of the institution (*cf* para 4.10).

The YCIA also embodies the general grounds for (temporary) limitation of the child's right to have contact with the outside world through correspondence, telephone calls and visits.⁴²⁵ These grounds are: the maintenance of order and security in the institution, the prevention or prosecution of criminal acts, the protection of victims or others affected by offences, the mental and physical development of the child and the enforcement of the residential or treatment plan (art. 41 lid 4 YCIA). Based on these grounds the director can also supervise the child's communication. He can check and even copy the content of letters or listen to telephone calls or record calls. Such supervision must be announced to the child in advance.

Limitation or supervision of contact with privileged persons is in principle prohibited. There are few exceptions. Parents are considered privileged persons as long as there are no substantial interests ('zwaarwegende belangen') of the child, not to regard them as such (art. 42 (1) (k) YCIA). According to the Explanatory Memorandum one should think of situations in which 'fathers' are under the suspicion of or have been sentenced for committing child sexual abuse or in which parents try to continue the exploitation of their children (e.g. in drug trade or prostitution). In addition, limitation of contact with parents is allowed if they expose a serious risk for the order or safety in the institution.⁴²⁶

Furthermore, the YCIA explicitly provides that the child's right to maintain contact with his family or wider community can be limited during the disciplinary sanction of confinement (art. 59 (1) YCIA; see para. 4.9.3). Remarkably, privileged persons are not excluded in this regard, while their right to get access to the child is

⁴²⁴ Other privileged persons are members of the Royal Family, members of Parliament, the Minister of Justice or the National Ombudsman. Furthermore, international (judicial) authorities competent to visit institutions under international treaties, which the Netherlands has ratified, such as the CPT, have a privileged status (art. 42 (1) (d) jo. (2) YCIA).

⁴²⁵ There may be some variation or more specific rules regarding limitation of this right. These will be addressed regarding each particular part separately. The YCIA does also provide for the duty of the director to hand out his decision to limit the child's right to correspond with or to receive visits from the wider community in writing; art. 62 YCIA. This is significant because the child has the right to remedy these decisions by filing a complaint (see para. 4.10) In addition, the Public Prosecutions Office can order the limitation of the child's right to have contact with the community if required for the criminal investigation; a competence based on art. 62 CCP, which can interfere with the provision of the YCIA (see para. 4.5).

⁴²⁶ Explanatory Memorandum YCIA, p. 53. The legislator explicitly refers to arts. 9 (1) and art. 37 (c) CRC. The YCIA grants the child's parents, guardians, step or foster parents a privileged position, while the CRC stands for upholding relations between the child and his extended family; see para 3.9.

of particular significance in this regard.⁴²⁷ The YCIA does provide that after 24 hours of confinement in a confinement cell the director must inform the supervisory committee and the doctor, but it is not clear whether the legislator found this satisfactory and deliberately allowed limitations regarding (other) privileged persons.⁴²⁸ In addition, the director does not have the competence to inform the child's parents in such situation. In any event, this provision is on strained terms with the reason for the acknowledgment of privileged persons (i.e. the increase of transparency and protection of the rights of children deprived of their liberty), which is also of great importance for the implementation of International Human Rights Law and Standards. It is recommendable to adjust the law in this regard and to prohibit any limitation of contact with privileged persons (besides parents who require a separate approach, taking into account the interests of the child).⁴²⁹

4.8.6.3 Mail

Each child has the right to send and receive letters at his own expense (art. 41 YCIA).⁴³⁰ The director is entitled to check letters and other postal items⁴³¹ to see whether prohibited items or contraband are included. The director is not obliged to inform the child in advance. While exercising this competence the director is not entitled to check the content of the letter. When mail of privileged persons, such as the child's lawyer, is concerned, the director may only exercise his competence in the presence of the child. It therefore is important that the director knows who the sender or the recipient is.⁴³²

⁴²⁷ According to the Appeals Committee the child in disciplinary confinement maintains his right to call his lawyer; see para. 4.9.3.

⁴²⁸ Note that the director has no such duty, if the child is confined in his *room* for more than 24 hours; the child then can remain deprived of contact with the outside world, including privileged persons. Furthermore, the YCIA allows limitation of the right to receive visits as a *disciplinary sanction* (art. 55 YCIA) if the reason to impose a sanction is related to a previous visit of that specific person; again visits of privileged persons are not explicitly excluded.

⁴²⁹ See further para. 4.9.3.

⁴³⁰ The Minister of Justice has explained that this does not necessarily include e-mail; *Proceedings II*, 1999/00, nr. 57, p. 4036.

⁴³¹ These include, e.g. tapes, CDs, discs or other data carriers; Explanatory Memorandum YCIA, p. 53

⁴³² The Ministerial Regulation Privileged Mail Juveniles, 5113407/01/DJI, 14 August 2001, *Government Gazette* 2001, 156, provides detailed rules regarding the director's competence to check these letters. It comes basically down to the following. A privileged sender who wants to send a letter to the child puts his letter in a closed envelope and puts this envelope into another envelope as an attachment to a letter to the director with the request to give that letter to the child. It should be clear to the director who the sender is and what his relation to the child is. If the director still finds reason to check the envelope (i.e. not the content!) he should open it while the child is present (art. 3). In the event the child wants to send a letter to a privileged person he should make clear to the director that the letter's destination is such a person, for example by writing 'letter to lawyer' on the envelope (art. 4). This Ministerial Regulation is a fine example of the Dutch government's mania for regulation.

The competence to check envelopes and postal packages must be distinguished from the right to inspect the content or refuse the sending or reception of mail based on the grounds as highlighted earlier above (art. 41 (3) and (4) YCIA). This competence cannot be exercised regarding mail from privileged persons. Correspondence between the child and his parents through mail, can nevertheless be limited if required by substantial interests of the child (art. 42 (1) (k) YCIA).

Both of the above mentioned competences are not exclusively reserved for the director, which implies that he can mandate these to staff members (art. 4 YCIA). However, the Minister of Justice pointed out that in light of respect of the child's privacy it is not desirable to mandate this competence to staff members who have direct contact with the child. It is better to mandate it to for example someone from the administrative department.⁴³³

4.8.6.4 Telephone Calls

In addition, each child has the right to make telephone calls for a minimum duration of ten minutes, at least two times a week (art. 44 YCIA), again in principle at the child's own expense.⁴³⁴ Again the director is entitled to supervise the phone calls. He can listen to the calls or record them and he can prohibit the child from calling a specific person for a maximum period of four weeks, all on the grounds mentioned above of if required to establish who the child is calling (art. 44 (2) jo. 41 (4) YCIA). If the child wants to make a phone call to one of the privileged persons, the competence of the director is limited to the determination of to whom the child is calling.⁴³⁵

According to the Minister of Justice the right to make a phone call to privileged persons complements the right to correspond through mail or to receive visits.⁴³⁶ This arguably explains why article 44 (4) YCIA has been formulated as a possibility that must be granted to the child if this is necessary and if there is a possibility to make the call. However, one should note that privileged persons include the child's parents and his lawyer. If the right to call these persons is limited for practical reasons or its exercise is dependent on an assessment on the necessity conducted by the staff members who may not be objective, the child could *de facto* merely remain entitled to send them a letter or to receive them as visitors. Although one should not lose sight of the manageability of institutional life, communication with privileged persons must be acknowledged as a fundamental legal safeguard for the child deprived of liberty, particularly in situations which require a quick response. Contact

⁴³³ Explanatory Memorandum YCIA, p. 54

⁴³⁴ Many institutions have a telephone cell in the group area, which may raise questions regarding the privacy and confidentiality of the phone calls.

⁴³⁵ Again regarding parents applies that substantial interests could legitimize denial of contact.

⁴³⁶ Explanatory Memorandum YCIA, p. 55.

with privileged persons should not be made dependent on practical (and potentially pragmatic) arguments or assessments made by staff members.⁴³⁷

Nevertheless, the YCIA safeguards the child's right to have contact with the wider community, including his family through mail and telephone calls.⁴³⁸

4.8.6.5 Visits

Each child has the right to receive visits for at least one hour a week, during times set by the institution's internal rules (art. 43 YCIA). For reasons of internal order and safety the director can limit the number of visitors that want to visit the child at the same time.

Based on the general grounds for limitations of contact with the wider community, the director has the discretion to limit this child's right to receive visits from specific individuals for a maximum duration of four weeks. However, a general denial of visits is not allowed. This implies that the director needs to assess the necessity to limit the child's right with respect to a specific person (or group of persons) individually. The same is true for the question whether there is need to prolong this period. In addition, the director can decide to supervise visits for the same reasons, which can include supervision over the content of the conversation and recording of it. Both child and visitors must be informed in advance.⁴³⁹

Regarding privileged persons the YCIA contains a specific provision that entitles these persons to visit the child (art. 43 (7) YCIA).⁴⁴⁰ In this regard, three groups of privileged visitors must be distinguished: (1) representatives of the Council for the Administration of Criminal Justice and Youth Protection, the institution's supervisory committee, inspectors of the Healthcare Inspectorate and inspectors of

⁴³⁷ According to the Appeals Committee practical rules regarding the manageability of making phone calls must not limit or deny the child's right to make phone calls (in this case with his lawyer or guardian); Appeals Committee, 6 February 2004, 03/2889/JA. *Cf* Appeals Committee, 6 June 2005, 05/0528/JA regarding the child's right to call his lawyer during disciplinary confinement; see para. 4.9.3.

⁴³⁸ Art. 37 (c) CRC provides for the right to maintain contact 'either through correspondence or visits', which does not necessarily seem to include making phone calls.

⁴³⁹ Due to the fact that the institution is entitled to prescribe specific visiting hours, the institution's administration is obliged to inform children and visitors of this. This was confirmed by the Appeals Committee in a case in which the institution had not informed the child adequately of the visiting options for his parents, which had eventually resulted in the child being deprived of visits from his parents. The Appeals Committee ruled that the institution was responsible; Appeals Committee, 25 June 2004, 04/0732/JA; see also Appeals Committee, 9 March 2005, 04/2936/JA; *cf* para. 4.7. Furthermore, the director is entitled to terminate visits if required for one of the general reasons; art. 43 (6) YCIA. In addition, visitors must bring ID and can be searched; art. 43 (5) YCIA.

⁴⁴⁰ Note that this provision has been formulated as an entitlement of privileged persons to get access to the child.

the Youth Care Inspectorate, (2) the child's legal representative (lawyer), family supervisor or probation officer and (3) the child's parents.

According to the YCIA the first group of privileged persons is entitled to visit the child 'at any time'. All other privileged persons are entitled to visit the child during the visiting hours. These persons can have a conversation with the child 'freely', which implies a meeting without supervision. The only exception in this regard (i.e. regarding all privileged visitors except those of the first group) can be that the director finds that the child is an immediate threat for the visitor's safety. In such a situation the visitor must be informed that the conversation will be supervised. In the event that a child meets his legal counsel this supervision may by no means breach the confidentiality of their conversation (art. 43 (7) YCIA).

The Appeals Committee has made some further distinctions with reference to the parliamentary history of the YCIA.⁴⁴¹ According to the Appeals Committee a distinction must be made between 'entrance at any time' and 'free entrance'. The first group of privileged persons is entitled to 'entrance [to the child] at any time', which implies at any given moment entrance is requested. This aims at facilitating visits to children individually, but given the function of the authorities belonging to this first group, it seems likely that it also aims at providing access for (general) inspection and monitoring of life inside the institution – an important legal safeguard for children.⁴⁴² 'Free entrance' means that the child can be visited outside the regular visiting hours, during working hours (but not during the night or weekends) and that there will be no supervision, unless the exception mentioned above is applied. Free entrance is granted to the second group of privileged visitors, that is the child's probation officer, family supervisor/guardian or lawyer. The Appeals Committee has deliberately not mentioned the child's parents in this regard; they are not entitled to 'free entrance'. Parents can visit their child and have a conversation without supervision ('freely'), but only during the visiting hours as set by the institution.⁴⁴³

Finally, there is a group of people, who are not privileged, but whose visits can be requested by the child (e.g. a brother, uncle or friend), provided that these visits take place during the regular visiting hours.

441 Appeals Committee, 25 June 2004, 04/0448/JA with reference to Parliamentary Documents 1998/99, 26 016, no. 6, p. 22.

442 *De facto* inspection visits are announced well in advance.

443 The YCIA Evaluation showed that in practice this was understood differently; YCIA Evaluation 2004, p. 126. There were signals that institutions had difficulties with organizing and granting visits to children and parents outside the visiting hours. This can be seen as a misunderstanding, taking into account the position of the Appeals Committee. At the same time this jurisprudence could be subject to debate due to the fact that the YCIA does not make the assumed distinction between the second (i.e. professionals) and the third (i.e. parents) group of privileged visitors in art. 43 (7) and that the parliamentary foundation used by the Appeals Committee is not very solid. Its analysis is merely founded on one – ambiguous – statement of the Minister of Justice.

Thus, based on this jurisprudence there are four kinds of visits: namely regular visits, visits with free contact, free entrance and entrance at any time. The child's parents have a particular position in the sense that they can visit their child with free (unsupervised) contact;⁴⁴⁴ this does, however, not include that they can visit their child outside the visiting hours. On the one hand this could be seen as a limitation of the child and his parents' mutual right to maintain contact; on the other hand it can be regarded as realistic.⁴⁴⁵ Still, it is important that the institution *de facto* enables the child's parents to come and visit their child, while taking into account their working scheme, for example by organizing visiting hours during weekends. Even though this may lead to problems of an organizational nature, it should be taken seriously in light of the child and his parents' mutual right to maintain contact (art. 37 (c) CRC; art. 9 CRC). In this regard it is important that the Minister of Justice has stressed that a parental visit must be regarded as an 'additional visit' added to the child's entitlement to receive visits for at least one hour a week.⁴⁴⁶ Moreover, the Appeals Committee has ruled that a child is entitled to make a request for an exception for visits of his parents, who are not capable of visiting during the regular (visiting) hours. The director must take such a request seriously and decide on it in a serious and well motivated (founded) way.⁴⁴⁷

As mentioned in paragraph 4.8.6.1, contact between the child and his parents can be limited based on the substantial interests of the child. In addition, one could raise the question whether parents should have the right to visit his child even if he has shown no interest in such visit or even made clear that he does not want to see his parents. In this regard one should also take into account that children may turn eighteen (the age of majority) during their stay in the institution.

Finally, it is important to reiterate that for the enforcement of the child's right to receive parental visits, he should preferably be placed in the vicinity of his parents (*cf* GC No. 10, para. 87).⁴⁴⁸

4.8.6.6 Contact with the Media

The YCIA provides the child with the possibility to 'have a conversation' with a representative from the media and vice versa (art. 45 YCIA). Contact is only possible if the director allows it at the request of the child or a representative from

⁴⁴⁴ Unlike the Appeals Committee reasoned in Appeals Committee, 9 March 2005, 04/2936/JA, this right is based on art. 43 (7) YCIA (and not on art. 80 YCIA; see para. 4.7.4).

⁴⁴⁵ E.g. visits can negatively interfere with the daily programme, including education.

⁴⁴⁶ *Parliamentary Documents II* 1998/99, 26 016, no. 6, p. 31.

⁴⁴⁷ Appeals Committee, 11 August 2004, 04/0842/JA. The child can remedy this decision by filing a complaint.

⁴⁴⁸ There may, however, be reason to place the child elsewhere (at significant distance from the parental home(s)); see para. 4.7.

the media.⁴⁴⁹ The director has to make his decision, while taking into account the interests of the order and safety in the institution, the protection of public order and public morals ('goede zeden'), the mental or physical development of the child, the enforcement of the residential or treatment plan, the protection of the rights and freedoms of others than the child and the prevention or investigation of criminal offences. The director can decide to supervise the conversation, if required in light of these interests. He can also attach special conditions to the visit of the representative and have him removed if he violates the conditions.

Media contact must not be seen as an additional right of the child to have contact with the outside world, although he can file a complaint regarding the director's decision to deny contact with the media (see para. 4.10). It can be regarded as significant in light of the transparency of youth institutions.

4.8.6.7 Leave Arrangements

With the possibility for leave arrangements, the YCIA recognizes the child as a member of his community, because the arrangements are meant to enable the child to actually leave the youth institution, while the deprivation of liberty formally continues; it does not suspend or terminate the detention or sentence (*cf* para. 4.3). Leave arrangements can include incidental leave for special occasions, such as a funeral, leave for court visits and leave as part of the residential or treatment plan, as part of the realization of the objectives of the deprivation of liberty (*cf* para. 4.11). The YCIA contains rules regarding leave, including rules regarding the decision-making process (such as risk assessments) and legal procedures in this regard.

Until 1 January 2008, the YCIA distinguished two groups of children: 'child protection children' and 'juvenile justice children'.⁴⁵⁰ The former group had a minimum entitlement to leave of at least twelve hours, once in every six weeks, while the latter group did not. These children were fully dependent upon the institution's administration and the Ministry of Justice in this regard. With the entry into force of the 2008 Closed Youth Care Act, the regulation changed. The YCIA currently grants each child under a treatment order a minimum right to leave (once every 6 weeks for a minimum of 12 hours, unless the director explicitly decides not to grant leave, e.g. because the child is a danger to himself or others – a decision which can be challenged before the complaints committee; art. 29 (1) and (2) YCIA). Other children in youth institutions have no right to leave, but can request

⁴⁴⁹ The wording of art. 45 YCIA implies that the media cannot be granted access to the child without the child's permission. The YCIA does not make any reference to the child's parents in this regard. *Cf* Ministerial circular of 5 July 2000, no. 5033148/00/DJI (Contact between juvenile/director and media) including attached model agreements.

⁴⁵⁰ Actually, the YCIA distinguishes between child protection children and all other children that can be placed in a youth institution (see para. 4.2), which includes juvenile justice children, but also, e.g. child refugees.

for leave and need authorization from the Minister of Justice (art. 30 YCIA; i.e. similar to the old regulation for all children but child protection children).⁴⁵¹

This recent legislative change has significant consequences, one of which is that a child under a treatment order placed in a remand home, while waiting for transfer to a treatment center, is entitled to leave the institution every six weeks (as a minimum). Another consequence arguably is that leave of children under a treatment order does no longer require the authorization of the Minister of Justice (see below). This new regulation can certainly be considered an improvement of the legal status of children placed in youth institution under a treatment order, particularly those placed temporarily in remand homes – at the same time it is not excluded that the legislator has not been fully aware of the consequences of this adjustment.⁴⁵²

The director can allow other children placed in a youth institution in the context of juvenile justice to leave the institution under authorization of the Minister of Justice (art. 30 YCIA). Leave can be accompanied by special conditions; the general condition is that the child will not commit any offences. The director can withdraw leave if necessary for the protection of society against the danger exposed by the child, for the safety of others or the general safety or in the event the child violates conditions.

As just mentioned there are different forms of leave. The two main forms are: incidental leave (arts. 32 and 34 YCIR) and leave as part of the residential or treatment plan (art. 33 YCIR).⁴⁵³

Incidental leave can be granted for unforeseen circumstances or circumstances in the child's private life, such as a funeral of a relative⁴⁵⁴ or birth of a child. It can also include a child's visit to someone who is not capable of visiting the institution. In this regard, this form of leave can be used to foster the child's contact with his family (*cf* art. 37 (c) CRC). Moreover, incidental leave can be used to make preparations for the child's reintegration. It can, for example be used to take a specific exam, to arrange some practical things relevant to the child's return or to

⁴⁵¹ As mentioned in para. 4.1 from 1 January 2008 'child protection children' will be transferred to or placed in institutions of closed youth care, governed by the new regulation embodied in the Youth Care Act. This regulation also includes rules regarding leave arrangements, but contains no minimum right to leave (art. 29v Youth Care Act). A child protection child placed in a youth institution (under art. 29k (2) Youth Care Act) falls within the scope of the YCIA and has a minimum right to leave (see art. 29 (1) jo. 10 (1) YCIA).

⁴⁵² E.g. art. 33 (4) YCIR has not been adjusted; see below.

⁴⁵³ Visits to and from court will not be discussed here; see art. 28 YCIA. It is the director's responsibility to enable (under conditions) the child to visit court and to fulfil his obligation to appear before the court. Furthermore, art. 77j CrimCo allows for temporary release granted by the Minister of Justice.

⁴⁵⁴ The Minister of Justice has deliberately used the word 'relative', which includes anyone with whom the child has a demonstrable relevant pedagogical relation; Explanatory Memorandum YCIR, p. 53.

enable him to attend interviews.⁴⁵⁵ The director determines the duration, which cannot exceed 72 hours. The child must make a request for incidental leave. If the child is in pre-trial detention the Public Prosecutions Office must give permission, besides the authorization of the Minister of Justice.

Leave as part of the residential or treatment plan (a leave arrangement) is meant for children in youth imprisonment or under a treatment order and has the objective to foster the realization of the objectives of deprivation of liberty, in particular the child's reintegration. Children in pre-trial detention or under a treatment order waiting for placement in a treatment center are excluded from leave arrangements (art. 33 (4) YCIR).⁴⁵⁶ Due to the fact that leave arrangements form part of the residential or treatment plan the institution has the initiative. The director can grant leave after a risk assessment in which the interests of the child must be balanced against the risks for continuity of the enforcement of the imprisonment or treatment order and the risks for the public order and safety (art. 31 YCIR).⁴⁵⁷ The director must include the nature of the committed offence, the public disturbance caused by the offence, his assessment of the risks of fleeing or recidivism, previous experiences with leave, the outcomes of a recent report on the child and his behaviour in the institution (art. 31 (3) YCIR). Again, the Minister of Justice must authorize the leave arrangement, which implies another assessment, and the Public Prosecutions Office must consent.

Leave arrangements can consist of one-day escorted leave, one day non-escorted leave, non-escorted leave of one day and one overnight stay, or non-escorted leave with more than one overnight stay.⁴⁵⁸ The director is responsible for the enforcement of leave (art. 35ff YCIR). He can determine that leave will be escorted; he can take measures if an incident occurs, such as involvement in disturbance of public order, commitment of a criminal offence, unacceptable use of alcohol or drugs, smuggling contrabands into the institution or not returning or returning too late (art. 36 (1) YCIR). The director can also withdraw leave.

Thus, there are possibilities to leave the youth institution incidentally or as part of a leave arrangement, which has been regulated thoroughly and in detail. Children

⁴⁵⁵ Explanatory Memorandum YCIR, p. 53.

⁴⁵⁶ The YCIR has not been adjusted and does not take into account that a child under a treatment order has a minimum right to leave based on art. 29 (1) YCIA (changed on 1 January 2008).

⁴⁵⁷ For more details on this risk assessment see art. 31 (2) YCIR; Liefwaard 2005, p. 96-98.

⁴⁵⁸ Explanatory Memorandum YCIR, p. 52-55. The Ministry of Justice has limited the leave arrangements to two overnight stays in two weeks. Within a reintegration programme, leave can be granted for one continuous period of a maximum duration of three weeks; Ministerial circular of 21 June 2004, nr. 5242947/03/DJI (Policy framework leave arrangements under the YCIA). In addition, leave arrangements abroad are excluded from authorization in the Ministerial circular of 5 September 2002, nr. 5181338/02/DJI (Leave abroad for children under the juvenile justice system), although the director of the Individual Youth Affairs Department of the National Agency for Correctional Institutions can grant special permission.

under a treatment order have a minimum right to leave; other children have not. The latter group of children is either excluded or fully dependent upon the institution and the authorization of the Minister of Justice.

Furthermore, the authorization of the Minister of Justice is experienced as unnecessarily complex and as merely stimulating bureaucracy, since the institutions arguably can best assess the possibilities and risks of each child in this regard. It might be better and more efficient to give the exclusive competence to decide regarding leave arrangements directly to the director of the institution, without the requirement of applying for authorization in advance.⁴⁵⁹ In the meantime one can only hope that the granting and authorization policies are not used too restrictively.⁴⁶⁰ Obviously, there are a number of reasons why one should consider leave of children under the juvenile justice system carefully and thoroughly. However, leave, in particular leave arrangements, are significant tools to improve the chances for a successful reintegration of the child into society. It therefore must at least be considered a significant part of the child's legal status, in particular the child's right to maintain contact with his family (and the wider community) and the child's right to be fully supported and assisted in his reintegration into society in order to play its constructive role (see further para. 4.11).

4.8.7 Conclusion

In conclusion, the YCIA contains minimum provisions that substantiate the quality of treatment each child deprived of his liberty is entitled to under International Human Rights Law and Standards. It provides (very) detailed regulations regarding accommodation, the institution's duty of care, education, training, activities, leisure, religion and contact with the family and the wider community. The general conclusion is justified that the law in this regard very much meets the International Human Rights Law and Standards. Not only as far as rules regarding rights and safeguards are concerned, but also regarding the explicit responsibilities of the institution's administration. In addition, the YCIA in general explicitly proclaims a connection between institution and community, an approach favoured by the JDLs. Only the health care system may form an exception to a certain extent in this regard. Furthermore, there are in general no significant problems regarding the YCIA's enforcement, which should not really surprise given the Dutch level of development (see the introductory remarks).⁴⁶¹

Nevertheless, this paragraph revealed a number of areas of concern either at the level of legislation, or at the practical level, which deserves further attention. These

⁴⁵⁹ YCIA Evaluation 2004, p. 154-156 and 190.

⁴⁶⁰ Cf e.g. Bartels 2003, p. 181-182.

⁴⁶¹ Nevertheless, it is interesting to note that the majority of complaints filed by children affect the general treatment ('bejegening'), food and unlawful placements in their rooms; see further para. 4.10.

included *inter alia* a shortage of youth psychiatrists, the absence of a medical check upon arrival, the hampering of the educational programme in light of recent legislative change, which requires further attention and time to develop, and the lack of a tailor-made approach in the educational programme. Further attention should be given to children's stay in groups as the core principle of institutional stay, particularly to the practical complications concerning the enforcement, which is to a large extent caused by other legislation, financial cutbacks and staffing problems (at least in some institutions). Regarding the child's right to have contact with his family and the wider community, the position of privileged persons (including his parents) deserve further attention, in particular in the situation a child in confinement as a disciplinary sanction.

Regarding leave the child is largely dependent on the institution and (potentially politically influenced) authorization of the Minister of Justice; due to the legislative change of 1 January 2008 children under a treatment order have a minimum right to leave (i.e. a minimum of 12 hours, once every six weeks).

The YCIA and related lower regulations provide a comprehensive set of rules regarding children's rights and institution's responsibilities. This comprehensiveness is also a risk (see para. 4.5). It *inter alia* requires adequate information for child, family and institutions for effective and strong implementation. In this regard specific attention should be given to those children who do not understand the Dutch language. Furthermore, the YCIA contains many norms that are open and require further substantiation and differentiation in practice, for example through the residential or treatment plan (see para. 4.11). In this regard the child's procedural rights, in particular the rights to file complaints are of significance (see below in para. 4.10).

4.9 MEASURES TO MAINTAIN ORDER IN INSTITUTIONS

4.9.1 Introduction

Deprivation of liberty of a child implies a significant limitation of his fundamental right to liberty of the person. During his deprivation of liberty there may be justified reasons to limit the child's freedom of movement or his privacy, in particular his physical integrity. One should think of measures to maintain or restore order, such as the use of restraint or force, or disciplinary measures. However, such limitations may never be unlawful or arbitrary and may never lead to deprivation of the fundamental principle that each child must be treated with humanity, with respect for his inherent dignity and in a manner that takes into account his needs as a child (art. 37 (c) CRC). Further limitations are only allowed if required by the special condition the child is in, while taking into account the principle of proportionality and the child's right to express his views (art. 12 CRC). Moreover, the best interests of the child must be of a primary consideration (art. 3 CRC).

Limitations may be justifiable in light of the objectives of the deprivation of liberty, but may by no means amount to violation of the child's right to protection against prohibited treatment or punishment under International Human Rights Law. On the one hand this calls for a clear understanding by those working in youth institutions of the prohibited forms of treatment or punishment; the child should be properly informed as well (*cf* para. 4.7). On the other hand it requires clear rules (minimum general principles) regarding the use of restraint, force or disciplinary measures, since these limitations may, if not used appropriately, constitute violations of International Human Rights Law.

International Human Rights Standards provide rules regarding the use of force or restraint and disciplinary measures, implying (sometimes far-reaching) limitations of the child's rights and freedoms (see paras. 3.10 and 3.6). This paragraph addresses the rules of the YCIA in this regard. The YCIA embodies detailed rules regarding the forms of restraint, force and disciplinary measure, but also regarding the competence and duration. In addition, the law provides legal safeguards and remedies.⁴⁶²

At this point it is important to stress that besides the director's competence to impose the just mentioned limitations, the director (or staff members on his behalf) can give less restrictive instructions to the child in to order change his behaviour or the situation in the group (art. 4 (3) YCIA).⁴⁶³ Less far-reaching instructions should as a principle be favoured.⁴⁶⁴

4.9.2 Use of Restraint or Force – Screening Instruments

4.9.2.1 Introduction

According to International Human Rights Standards the use of force and restraint must have its foundation in law and may not be arbitrary. It must be necessary in light of the circumstances of the case (i.e. there are no other means available) and it must be used as a measure of last resort only. The CRC Committee has adopted the approach that restraint or force can only be used if the child poses an imminent threat of injury to himself or others; the JDLs allow their use in exceptional circumstances, including serious destruction of property. Together they allow the use of restraint and force to maintain or restore order and safety in the institution, which should serve in particular the children's interests.

⁴⁶² These will be addressed in para. 4.10.

⁴⁶³ The director can give instructions if required for the maintenance of the institution's order and safety, the undisturbed execution of the deprivation of liberty, the child's mental and physical development or the enforcement of the residential or treatment plan.

⁴⁶⁴ It also tackles the possible misunderstanding that the YCIA provides the use of force, restraint and disciplinary measures as the only option (to maintain order in the institution).

The Dutch legislator has chosen a regulative approach. Under the YCIA a child in a youth institution can be forced to act in a certain way or to tolerate certain acts. One could think of screening measures, such as checking a child's clothes or a strip search his room. In addition, the director is entitled to use force or restraint against a child, such as forcible transport to his room or the use of handcuffs. The YCIA contains an exhaustive list of measures that limit the child's human rights and fundamental freedoms, in particular his freedom of movement, right to privacy and physical integrity. Despite the doctrine of minimal limitations (see para. 4.5) the Minister of Justice found it necessary to include this exhaustive list in the YCIA, given the child's very dependent status and the need to ensure legal certainty and equality.⁴⁶⁵

Therefore article 32 YCIA states that the child's rights to physical integrity and privacy may only be limited in accordance with the rules provided by article 33ff YCIA. The YCIA regulation can be divided by screening instrument: identification, search of clothes and body search, urine test, internal body search and room search. In addition, there are competences to use force or restraint, namely: forced medical treatment, use of mechanical means and use of force.⁴⁶⁶

4.9.2.2 Screening Instruments

A. Identification

The director can oblige the child to wear ID which he must show upon request (art. 33 YCIA). In addition, the child can be forced to cooperate in taking a photograph, fingerprints or a hand scan. *De facto*, such cooperation is often required upon admission for the administration of the child's file.⁴⁶⁷

B. Search of Clothes and Body Search

Upon admission and if the child leaves the institution the director is competent to (order the) search the child's clothes or body (art. 34 YCIA). Body search includes a search of the body's natural openings and cavities, such as mouth and anus.⁴⁶⁸ Search of clothes includes the search for objects in the clothes (art. 34 (2) YCIA). The director is also entitled to search clothes and conduct a body search of the child before or after he receives visits or if required for the interests of maintaining the institution's order and safety.⁴⁶⁹ The search must be conducted in private and, if

⁴⁶⁵ Explanatory Memorandum YCIA, p. 6-7 and 46. The same applies regarding disciplinary measures (see below). As mentioned in para. 4.6 this regulative approach is to some extent prompted by the security objective of youth institutions.

⁴⁶⁶ Cf Explanatory Memorandum YCIA, p. 46-51. International Human Rights Standards tend to distinguish between the use of force and of restraint; in the YCIA one could also distinguish screening instruments. The EPR does recognize screening instruments explicitly.

⁴⁶⁷ See, e.g. YCIA Evaluation, p. 163.

⁴⁶⁸ Body search must be distinguished from internal body search; see below.

⁴⁶⁹ The clothes of the child's visitors can be searched as well, according to art. 43 (5) YCIA.

possible, by a person of the same gender⁴⁷⁰ (art. 34 (3) YCIA). Many institutions have special rooms (close to the visiting area or entrance) where these searches can be conducted. A body search is also allowed after a visit of a privileged visitor, such as the child's lawyer.⁴⁷¹

C. Urine Test

The director has explicitly been provided with the authority to check the child's urine for the presence of substances that affect the child's behaviour, such as drugs or alcohol (art. 35 YCIA). This screening method is only allowed if required by the interests of the institution's order or safety or with regard to a decision to place or transfer the child. A urine test can also be required for the decision to grant a child to leave the institution.⁴⁷²

D. Internal Body Search

The director can order a search of the child's internal body if required to avert a 'serious threat' to the institution's order or safety or to the child's health (art. 36 YCIA). One could think of the situation in which a child has used too many drugs or has tried to commit suicide through swallowing hazardous materials or substances (e.g. razor blades).⁴⁷³ This research is more far-reaching than a body search as addressed above; it may include surgery and X-ray. The internal body search must be conducted by a doctor or by a nurse who has received direct orders from a doctor. If there is an urgent necessity to respond and to check the child's body internally and contact with the medical staff is not possible or their presence cannot be awaited, a staff member is entitled to do the search. It needs no explanation that this situation must be avoided as much as possible.⁴⁷⁴

⁴⁷⁰ Although the JDLs do not provide rules in this regard, the EPR stipulate that such search may be conducted by staff of the same gender only (rule 54.5). It does not leave room for diversion.

⁴⁷¹ Appeals Committee, 13 July 2005, 05/0672/JA. The Appeals Committee stressed the significance of this screening instrument for the prevention of the presence of prohibited goods (e.g. drugs) in the institution and argued that it would not be realistic for the director to allow exceptions in this regard for (some of) the privileged persons, in particular because (in this particular case) it concerned a remand home, where many children in pre-trial come and go. This reasoning disregards, however, the significance of the distinction between privileged persons and non-privileged persons (see para. 4.8.6); it basically reflects a distrust of lawyers. *Cf* Appeals Committee, 6 February 2004, 03/2468/JA in which the Appeals Committee ruled that a boy's body search after his return from the police station was neither a violation of the law, because the director is entitled to body search the child, nor unreasonable, because one cannot exclude (and one should know from experience) that children can even after a visit to the police station return with items that are prohibited.

⁴⁷² *Cf* Ministerial Regulation Urine Test, 5113408/01/DJI, 14 August 2001, *Government Gazette* 2001, 156.

⁴⁷³ Internal body search also comes into play if objects are found during (non-internal) body search, but if they cannot be removed without specific devices; art. 34 (4) jo. 36 (3) YCIA.

⁴⁷⁴ In such a situation transfer to a local hospital may be more appropriate, although safeguarding the safety of the child and (those in) the hospital could be problematic.

E. Room Search

In light of the general supervision of the presence of prohibited goods or if required for the interests of the maintenance of the institution's order or safety, the director is competent to search the child's room (art. 39 YCIA). The search's objective is to check whether the child possesses goods that are not allowed; guidance in this regard is provided by the internal rules.⁴⁷⁵

4.9.2.3 Use of Force and Restraint

A. Forced Medical Treatment

If the doctor finds it 'absolutely necessary' to provide medical treatment, without the child's or his parents consent,⁴⁷⁶ to avert a 'threat' to the health or safety of the child or others, the director can order the child's forced medical treatment (art. 37 YCIA). A threat in this regard means for example that the child's life is in danger or that there is threat of self-mutilation or a risk of permanent disability. Forced medical treatment, including forced medication, can only be conducted by a doctor, who has his own responsibility and cannot be forced by the director, although it is the latter's legal competence to instigate the treatment. If the forced medication is regarded necessary to avert a threat related to the child's mental disorder, the director must consult a (youth) psychiatrist (art. 48 (2) YCIR). The main reason for this limitation was due, according to the Minister of Justice, to the growing number of children with mental disorders who act out in uncontrolled and, without medical intervention, uncontrollable behaviour.⁴⁷⁷

The YCIR provides for a number of additional rules (art. 48ff) and stipulates *inter alia* that the director must consult the medical staff (doctor and/or psychiatrist) first in order to determine whether there are no alternatives to avert the threat and which treatment would be the least far-reaching. The Minister of Justice has also stressed that forced medical treatment must be used as a measure of last resort only, which implies only if there is no other way of achieving the intended result. At the same time he suggests forced medication for the child's sedation could be favoured over tying down children (see below).⁴⁷⁸

⁴⁷⁵ Cf para. 4.8 regarding the possession of personal affects. Room search can also be used to search for the child's DNA material, ordered by the Public Prosecutions Office under the DNA Testing (Convicted Persons) Act; an act subject to debate under art. 40 CRC's requirement of protection of privacy; cf Wolthuis & Eijgenraam 2006.

⁴⁷⁶ As mentioned in para. 4.8 the parents, the child or both have to consent to medical treatment depending on the child's age. This principle can be set aside under art. 37 YCIA; Explanatory Memorandum YCIA, p. 48-49.

⁴⁷⁷ This may require the involvement of a youth psychiatrist. In this regard art. 37 (2) YCIA provides that an additional regulation will be drawn up regulating at least the registration and reporting of the use of this competence and a further description of the doctor's task in the event that the child suffers from a mental disorder. However, such a regulation has never been drawn up.

⁴⁷⁸ Explanatory Memorandum YCIA, p. 49. Cf art. 16

As soon as possible after forced medical treatment has started, a plan must be drawn up, under the responsibility of the doctor, aiming at preventing the use of forced medical treatment in the future (art. 50 YCIR). The medical decisions, the doctor's findings during the forced medical treatment and the plan to avert forced medical treatment in the future must be recorded in the child's medical file (arts. 48-50 YCIR).

It is important to stress that youth institutions have their shortcomings, in particular regarding the treatment of children with psychiatric problems, *inter alia* due to the lack of adequate staff (e.g. youth psychiatrists).⁴⁷⁹ If a child has serious and uncontrollable problems due to a psychiatric disorder and the institution is unable to respond adequately, one should transfer the child to another institution that is capable or to a (closed) psychiatric hospital (art. 16 (6) YCIA).⁴⁸⁰

B. Use of Force or Restraint

The YCIA contains a general provision regarding the use of force⁴⁸¹ and restraint.⁴⁸² The director has the competence to use force or restraint if required for the maintenance of the institution's order and safety, for the enforcement of a decision made by him or on his behalf or for the prevention of the child's evasion from his supervision (art. 40 YCIA).⁴⁸³ One could for example think of the situation in which a child is ordered to stay in his room, but the child refuses to go there. Such a situation may require the use of force to move the child to his room. Restraint may be used for instance to prevent the child from running away.

The use of force or restraint is only permitted if necessary. The child must be warned first. This can however be set aside if immediate action is required.⁴⁸⁴ An important detail is that this competence has not been entrusted only to the director.

⁴⁷⁹ See, e.g. the reports of the Youth Inspectorates and the Court of Audit; para. 4.1.

⁴⁸⁰ This revolves around the relation between the youth psychiatry ('jeugd-ggz') and youth institutions, and is currently subject to debate in light of the establishment of institutions for closed youth care, which have significantly far-reaching competences to use forced medical treatment.

⁴⁸¹ Force has been defined as 'every forceful power of more than just some significance on people or goods'; the use of force includes the threat of the use of force; art. 1 (d) and (e) of the Ministerial Regulation Instructions for the Use of Force.

⁴⁸² Restraint implies the use of instruments that forcefully limit the child's freedom of movement, such as handcuffs or a stick attached to the child's leg, which prevents him from running away ('broekstok'); art. 1 (f) Ministerial Regulation Instructions for the Use of Force; Explanatory Memorandum YCIA, p. 51.

⁴⁸³ In addition, it can be used if ordered by the public prosecutor or examining judge for prosecutorial reasons. This includes, e.g. forced yielding of DNA under the DNA Testing (Convicted Persons) Act.

⁴⁸⁴ Explanatory Memorandum YCIA, p. 51.

A staff member is entitled to exercise this competence as well. However, he must immediately send a written report to the director (art. 40 (3) YCIA).⁴⁸⁵

The YCIA does not provide an exhaustive list of allowed forms of force or restraint under article 40.⁴⁸⁶ Consequently, this provision is a general, rather open norm, which can be used by the institution's administration (both director and staff members). Although the requirement of necessity must be fully respected (including an initial warning) and the decision must be reported if made by others than the director, the competence is far-reaching and arguably is on strained terms with International Human Rights Standards, in particular rule 64 JDLs. At the same time it is realistic to assume that there are situations in which staff should be allowed to use certain force in order to fulfil their pedagogical task. However, this should be limited to a minimum, to a minimum level of severity and it requires certain skills.

Reticence is appropriate in light of the requirement of necessity, which forces staff to continuously ask themselves the question whether the force or restraint is (and remains) necessary given the legitimate grounds; for example, the use of force or restraint for disciplinary or educational purposes is prohibited.⁴⁸⁷ Second, the minimum level of severity implies that the principle of proportionality should be kept in mind constantly.⁴⁸⁸ Under the YCIA this implies that the use of force or restraint may not fall under article 38 YCIA, regulating the use of mechanical means while a child is in confinement (see below). Third, staff (and the director) should be well trained in how to prevent the use of force and restraint and how to use it correctly in the inevitable situation.

These remarks are of particular significance given the Ministerial Regulation regarding Instructions for the Use of Force, which regulate the use of force and restraint under article 40 YCIA.⁴⁸⁹ The regulation has far-reaching implications. It provides *inter alia* a number of provisions regarding the use of force or restraint by staff members. They can use a stick attached to the child's leg, which prevents him from running away ('broekstok'), or handcuffs in order to transport the child either outside or inside the institution. The director can authorize staff members to carry a

⁴⁸⁵ The selection official is also entitled to order the use of force or restraint by staff members responsible for the enforcement of his decisions (e.g. decisions regarding placement or transfer) or if required to prevent the child evading supervision (e.g. during an STP granted by the selection official); art. 40 (2) YCIA.

⁴⁸⁶ See, e.g. Appeals Committee, 30 November 2006, 06/2211/JA in which the use of a pillow case was regarded as a form of permitted violence under art. 40 YCIA, provided that its use was in conformity with the principles of proportionality and subsidiarity, given the circumstances of the case.

⁴⁸⁷ Explanatory Memorandum YCIA, p. 51. This is supported by the recent adoption of the prohibition of violence as a part of upbringing in art. 1:247 (2) Civil Code (see para. 4.5).

⁴⁸⁸ See, e.g. Appeals Committee, 25 June 2004, 04/0627/JA.

⁴⁸⁹ Ministerial Regulation Instructions for the Use of Force, 5113417/01/DJI, 14 August 2001, *Government Gazette* 2001, 156.

short or long weapon such as a stick.⁴⁹⁰ Moreover, the regulation provides that one can use two kinds of semi-automatic weapons, although only under the director's explicit permission and only by those staff members who are entitled to do so and who have been trained to use these weapons. A weapon may only be used if necessary for the arrest of a child who has a gun or is under reasonable suspicion of having one, to regain control over the institution in the event of a disturbance or to avert immediate danger to the lives of individuals (art. 9).⁴⁹¹

Furthermore, a national special assistance unit of the National Agency for Correctional Institutions can be deployed inside the institution by the director or specially trained staff members with permission of the director. This unit is authorized to use CS-teargas, ordered by the director, if required to arrest a child who has a firearm or is under reasonable suspicion of having one or in the event of a serious and immediate threat to the institution's order or safety caused by groups of children. If these instruments are used, there is a duty to report the matter to the institution's administration, if not already involved. In addition, a doctor must be consulted together with the head director of the Ministry of Justice, the Public Prosecutions Office and the supervisory committee.⁴⁹²

Article 40 YCIA in conjunction with the Ministerial Regulation regarding Instructions for the Use of Force are particularly far-reaching. Given the open norms in the law and detailed authorizations of the regulation, which lacks a statutory status, this cannot be regarded as in conformity with International Human Rights Standards. Although strictly there is a legal foundation for the use of force and restraint, the Ministerial Regulation can neither be regarded as proportionate as such, nor as child-oriented. For example allowing the use of firearms, even if legally restricted to a minimum is on strained terms with rule 65 JDLs, excluding the possession and use of weapons in institutions, which arguably stretches to (semi-)weapons such as chemicals, pepper-spray and truncheons. It is therefore strongly recommendable to delete these options from the regulation.

C. Use of Mechanical Means / Fixation

Besides the general provision regarding the use of force or restraint, article 38 YCIA provides that mechanical means can be used regarding children in confinement, who need fixation, for example due to heavy unrest of their motor system.⁴⁹³ Fixation

⁴⁹⁰ The selection official can provide such authorization as well.

⁴⁹¹ Cf art. 9ff Ministerial Regulation Instructions for the Use of Force.

⁴⁹² No reference has been made to the child's parents.

⁴⁹³ Explanatory Memorandum YCIA, p. 50. The reason to adopt the possibility to use mechanical means was that consultation among institutions' administrations revealed that there was a need for the discretion to use mechanical means, mainly to protect the child against self-mutilation or even suicide; see Clarification of Ministerial Regulation Use of Mechanical Means.

may only be used as a measure of last resort and only if required to avert the child being a serious threat to his own health or the safety of others.

Article 38 YCIA differentiates according to age regarding the maximum duration of the fixation. If the child is younger than sixteen, fixation may take place for a maximum of twelve hours; if he is sixteen or older the maximum duration is 24 hours. The director must inform the institution's doctor and supervisory committee immediately.⁴⁹⁴ If the director's presence cannot be awaited (i.e. immediate fixation is required) staff members are allowed to fixate a child for a maximum of four hours, as a temporary solution, but they must inform the director and the doctor and supervisory committee immediately.

The Ministerial Regulation Use of Mechanical Means for Juveniles⁴⁹⁵ provides additional rules regarding the use of mechanical means to fixate the child. According to this regulation permitted mechanical means are: special gloves, mouth protection, wrist bands that can be connected to a belt, ankle bands that can be attached to each other, handcuffs, safety helmet or restraining sheet (or straitjacket). This is an exhaustive list (i.e. no other means can be used), which does not prevent the director from using more than one mechanical instrument if necessary (art. 2 (2) of the regulation).⁴⁹⁶ The use of mechanical means cannot limit the child's freedom of movement more than strictly required to avert the child's threat to his health or the safety of others and the choice of the specific instrument must prevent as much as possible the child no longer being able to eat,⁴⁹⁷ drink, go to the toilet or sleep. Otherwise the child must be assisted by staff members (art. 3 jo. 8 of the regulation).

The use of mechanical means is particularly far-reaching. It limits the child's freedom of movement and infringes the child's physical integrity to a large extent. This is the reason why the use of mechanical means must be avoided as much as possible.⁴⁹⁸ It really must be a measure of last resort, only if required to protect the child and other inmates against a serious threat and if used, only in the least infringing way. The principle of proportionality and respect for human dignity,

⁴⁹⁴ Again the YCIA makes no reference to the child's parents. However, art. 5 Ministerial Regulation Use of Mechanical Means provides that the child's parents, guardian, step or foster parents must be informed as soon as possible about the use of mechanical means concerning their child.

⁴⁹⁵ Ministerial Regulation Use of Mechanical Means for Juveniles, 5113409/01/DJI, 14 August 2001, *Government Gazette* 2001, 156.

⁴⁹⁶ According to the explanation of the Ministerial Regulation the use of a safety bed is not allowed. In addition, the Council rejected the use of safety beds in departments for intensive care or treatment (in two institutions), because it is considered a measure that is too extreme. The Council also argued that one must seek other means to respond to children with psychiatric disorders in this regard; Advice of the Council of 21 September 2007 (No. 20071010) regarding 'The safety bed in youth institutions. Adjustment of Regulation Mechanical Means.'

⁴⁹⁷ The child should receive at least three meals a day; art. 8 (1) of the regulation.

⁴⁹⁸ As mentioned above, the Minister generally prefers the use of forced medication (art. 37 YCIA) rather than the use of fixation.

which are fundamental regarding the enforcement of deprivation of liberty, must be upheld if the use of mechanical means is required.

Given the severity of the infringements the Minister of Justice has deliberately not adopted the possibility to prolong the measure of fixation. After the maximum period of twelve or 24 hours the director must have found other ways of dealing with the threat exposed by the child.⁴⁹⁹

Furthermore, if mechanical means are used, there must be regular checks of every thirty minutes during the day and every sixty minutes during the night. If the means can cause suffocation, the child must be observed constantly. Regular surveillance or constant observation can also be done through camera surveillance (art. 25a YCIA).⁵⁰⁰

Finally, the director has the duty (and sole competence) to draw up a protocol, which should be used for the implementation of the YCIA and should *inter alia* include a prescription regarding the use of the mechanic instruments that are available in the institution, guidelines regarding the decision-making process and the reporting system. In addition, rules should be set regarding the training of staff, such as regarding the use of force and restraint in general which is of eminent significance.

In conclusion, article 38 YCIA is one of the most far-reaching competences that can infringe the child's rights and freedoms. It is founded in the YCIA and the director is exclusively competent. The safety, and thus protection of the child and others are the only legitimate grounds for the use of mechanical means and only after a careful assessment taking into account other less infringing options. Furthermore, their use is limited in time and there are additional safeguards that must be taken into account. In addition, the child can remedy the decision by filing a complaint (see also below). Above all, mechanical means may never be used for disciplinary purposes or as part of the regime. In light of this, particularly the legal foundation, the director's sole competence and the requirement of last resort, this provision can be regarded as acceptable under International Human Rights Standards.

4.9.2.4 Some Concluding Remarks

The YCIA contains an exhaustive list of competences to limit the child's privacy and physical integrity (art. 32 YCIA). The key principle is that these limitations must be required by the specific grounds provided by the law, such as the protection of the child or others, maintenance of the institution's order and safety or the

⁴⁹⁹ Clarification of Ministerial Regulation Use of Mechanical Means. If the child suffers psychiatric disorder, transfer to a psychiatric hospital is indicated (art. 16 (6) YCIA).

⁵⁰⁰ See also art. 7 of the regulation; see Clarification of Ministerial Regulation Use of Mechanical Means.

enforcement of decisions of the institution's administration.⁵⁰¹ In addition, each limitation requires an individual decision, which rules out limitations as a general rule. Limitations as part of standard procedures (e.g. a body search before and after visits) are on strained terms with this principle. Even though institutions may want to standardize procedures, limitations that are this far-reaching should be regarded as separate individual decisions, regarding which the requirements set by the YCIA should be met each time they are imposed on the child and regarding which the child can exercise his right to remedy the decision (see para. 4.10).⁵⁰²

The most far-reaching competences, namely internal body research, forced medical treatment and the use of mechanical means, are exclusively reserved for the director of the institution and cannot be delegated to staff members (art. 4 (4) YCIA). The other decisions can also be made by staff members on behalf of the director. Although, this reveals a realistic view on institutions to some extent, the non-exclusiveness of the competence (i.e. it is not exclusively reserved for the director) to use force or restraint can be regarded as being on strained terms with International Human Rights Standards, in particular with rule 64 JDLs, which provides that the director should be exclusively competent to order the use of force or restraint. This conclusion is even more prominent given the far-reaching regulations drawn up in this regard.

Regardless of the division of competences, all decisions can only be made on behalf of the director, which implies that the child has the right to remedy all of these, either through filing complaints or lodging a medical appeal, and to challenge (alleged) unlawful or arbitrary limitations.⁵⁰³

Another significant safeguard is that the director must hear the child when he considers making decisions regarding internal body searches, forced medical treatment and the use of mechanical means. This hearing must take place afterwards, if immediate action is required or if the child's state of mind hampers a proper hearing (art. 61 (1) and (3) YCIA). In addition, the child must be given a written and motivated decision on the use of these competences, a copy of which must be put in the child's file (art. 67 (a) YCIR). This written decision must be in a language he

⁵⁰¹ Furthermore, there are specific rules regarding seizure of goods found during the screening of clothes, body or room (see art. 34 (4), 36 (3) and 39 (2) YCIA).

⁵⁰² The jurisprudence addressed above is also in this regard remarkable.

⁵⁰³ Another safeguard in this regard is independent supervision and monitoring; see, e.g. also the duty to report the use of mechanical means to the supervisory committee. See also para. 4.10.

understands.⁵⁰⁴ He must also be provided with information on his right to file a complaint or make a request for mediation (art. 62 (1) and (4) YCIA).⁵⁰⁵

Finally, the use of force, restraint or instruments for screening requires staff that are capable of coping with these means, which implies that one should provide appropriate training regarding the competences and usage.

The YCIA Evaluation has pointed out that most of the legal means are not used. The institutions explained upon request that they use the competences to search the body and clothes, to screen children's urine and their rooms. Mechanical means are hardly ever used. Regarding forced medication, directors and unit leaders provided different answers, although it does not seem to occur frequently. The regulation as embodied in the YCIA is in general regarded as clear, relevant and workable.⁵⁰⁶ Children found the use of screening methods acceptable, in particular in the event of the use of drugs. The same turned out to be true regarding the use of appropriate force if a child's behaviour justifies such use.⁵⁰⁷

In general there is a lack of (publicly available) figures on the use of force, restraint and screening instruments.⁵⁰⁸ The number of urine tests was registered and published in the Planning & Control surveys of the National Agency for Correctional Institutions until 2001. Since then these figures have not been published anymore. Other figures have never been published. It therefore is hard to provide (disaggregated) data in this regard, which is worrying, because it concerns far-reaching limitations of children's human rights and fundamental freedoms. Moreover, it is on strained terms with the recommendations of the CRC Committee in this regard (GC No. 10, paras. 98-99; *cf* para. 3.13).

Based on the findings of the YCIA Evaluation one could wonder whether it was really necessary to provide for all these competences. One could argue that there is no real need for all these competences, means and tools, so why should one adopt these in the law. Would that not lead to an increase in the use of these far-reaching instruments? Does this not provide for too much power to an institution's administration to control children? This thought can be supported by the fact the legislator has chosen to formulate article 32ff YCIA as competences directed to the institution's administration by using wording such as 'The director is competent

⁵⁰⁴ Which may require translation or additional (oral) information if the child is not capable of reading or understanding the language.

⁵⁰⁵ That a (formal) hearing is not prescribed with regard to the other decisions, does not refrain staff and director from the duty to communicate with children and to explain why they find it necessary to use, e.g. screening instruments or force.

⁵⁰⁶ YCIA Evaluation 2004, p. 164.

⁵⁰⁷ *Ibid.*, p. 191.

⁵⁰⁸ *Cf Ibid.*, p. 83-84.

to...'. This could be defended on the other hand as the law proclaims restrictive usage, which could be favoured over not regulating the use of these instruments, while they are used anyway, occasionally or frequently. The credo then would be: 'it is better to regulate well, than not to regulate'. Above all, the points of departure should remain that in principle each child remains entitled to all rights, including protection against unlawful or arbitrary infringements and that limitations may only be used reticently.⁵⁰⁹

Finally, one could argue that the principle of the best interests of the child should be more present in the current provisions. The current terminology suggests that the instruments are mainly designed for organizational reasons such as the maintenance of order and safety, which can be in the (other) child's best interests, but does nevertheless not appeal directly on the institution's administration to balance the best interests of the individual child as a primary consideration against the other interests (of the institution).

4.9.3 Disciplinary Measures

4.9.3.1 Introduction

For the maintenance of order and safety in the institution, the director may need to use disciplinary measures. International Human Rights Standards provide that such measures should be consistent with the upholding of the child's inherent dignity and they should serve the objectives of institutional care, that is 'instilling a sense of justice, self-respect and respect for the basic rights of every person' (rule 66 JDLs jo. arts. 37 (c) and 40 (1) CRC). International Human Rights Standards in this regard merely provide fundamental principles, prohibited measures and some legal safeguards. In addition, they embody an instruction to domestic legislators what as a minimum should be regulated by law (see para. 3.10).

The Dutch legislator has provided rather detailed provisions concerning the use of measures to maintain order in youth institutions. The YCIA contains two different sets of measures: 'measures of order' (art. 24ff YCIA) and 'disciplinary sanctions' (art. 54ff YCIA). There are three elements, which distinguish the two sets of measures (see table 4.3).⁵¹⁰ First, measures of order have the objective to restore the order or safety in the institution or to protect the child from any danger for himself or others, caused by him or by others.⁵¹¹ Disciplinary sanctions are meant to

⁵⁰⁹ Note the competence to give (less far-reaching) instructions, art. 4 (3) YCIA (see para. 4.9.1).

⁵¹⁰ Explanatory Memorandum YCIA, p. 39-41 and 61-62; cf Liefwaard 2005, p. 104-105.

⁵¹¹ Measures of order can also be used if the child's participates in a (reintegration) programme outside the institution, based on the ground that it is required for an 'undisturbed enforcement of the deprivation of liberty' ('ongestoorde tenuitvoerlegging van de vrijheidsbeneming');

discipline an individual child for his behaviour that has put the institution's order or safety at risk; it thus is a measure of correction. As a consequence a disciplinary sanction can be imposed on a child if his behaviour 'deserves' a disciplinary reaction, under the condition that he can be held accountable for his behaviour. Accountability is not a precondition for imposing a measure of order – the second distinctive element.

The third element affects the duration of the measure or sanction. A measure of order can last, within the boundaries set by the YCIA, as long as required for the restoration of the institution's order and safety or protection of the child or others. As soon as the measure's objective has been realized it must be ended. The duration of a disciplinary sanction on the contrary is based on the gravity of the child's culpable behaviour and the principle of proportionality. The director must determine the duration of the sanction in advance, again within the legal boundaries.

Table 4.3: Distinctive Elements Measures of Order and Disciplinary Sanctions

	Measure of order	Disciplinary sanction
Ground / Case	Disturbance of order or safety / need for protection (accountability is not required)	Culpable behaviour + accountability
Duration	As long as required: to restore order and safety / for protection	Determined in advance, depending on the behaviour
Objective	Restoration of order and safety / Protection	Disciplining / correction

4.9.3.2 Measures of Order

The measures of order are divided in exclusion from the groups or group activities (hereinafter: exclusion), confinement, confinement in another institution or temporary transfer (art. 24ff YCIA). This list is not exhaustive. Less far-reaching measures to restore order can be used as well and should – in light of a minimum use

of these measures – preferably be used instead. In addition, it is possible to impose more than one measure of order at once.⁵¹²

A. Exclusion and Confinement

The most commonly used measures are exclusion and confinement (art. 24 resp. 25 YCIA).⁵¹³ The main grounds for excluding a child from the group or from group activities or confinement are (1) the interests of the institution's order and safety, and (2) the protection of the child. The decision to use exclusion or confinement on these grounds is exclusively reserved for the director (art. 4 (4) YCIA).⁵¹⁴ Exclusion is enforced in the child's room and can last for two days – a time period that can be prolonged by the director, if the necessity to exclude still exists (art. 24 (2) YCIA). The decision to confine a child in a confinement cell or in another place, his room not excluded, can last for one day if the child is younger than sixteen years, with a possibility to prolong for another day.⁵¹⁵ If the child is sixteen or older, confinement can last two days, and can be prolonged by a maximum of another two days (art. 25 (3) YCIA). Confinement implies that the child does not participate in group activities and it therefore includes exclusion.⁵¹⁶

Confinement may not imply complete isolation. If a child is placed in confinement there must be contact between the child and staff members; the nature and frequency must be appropriate given the child's situation (art. 25 (5) YCIA).⁵¹⁷ Moreover, he remains entitled to contact with the outside world. The YCIA does not provide another legal ground for limitation (besides the ones as addressed in para. 4.8).⁵¹⁸ In the event that the confinement lasts longer than 24 hours the director must

⁵¹² The Minister has not mentioned the measures of order when summing up the issues that have been regulated exhaustively; Explanatory Memorandum YCIA, p. 11. In addition, the director (or staff members on his behalf) can give less far-reaching instructions to the child in order to change his behaviour or the situation in the group (art. 4 (3) YCIA); Explanatory Memorandum YCIA, p. 43. Cf Appeals Committee, 24 February 2003, 02/2246/JA.

⁵¹³ YCIA Evaluation 2004, p. 161-162.

⁵¹⁴ A measure of order can also be 'imposed' if a child is (reported) ill or upon his reasonable and enforceable request; art. 24 (1) YCIA. As mentioned in para. 4.8.4 this is a rather far-reaching formalization of allowing exceptions to the principle that children are to stay in a group or participate in group activities; an order based on these grounds is not exclusively reserved for the director.

⁵¹⁵ A confinement cell should only be used if the child cannot be placed in his room; art. 3 Ministerial Regulation Disciplinary and Confinement Cell Youth institutions. For more on this regulation see para. 4.9.3.3.

⁵¹⁶ The director can allow the child to participate anyway. If the child is excluded or confined he should not be deprived of his right to enjoy fresh air for at least one hour a day, although this may be granted in a separate recreation yard (art. 24 (1) resp. 25 (2) YCIA; cf para. 4.8).

⁵¹⁷ If required for the protection of the child's mental or physical condition, the director can order camera surveillance during day and night, after consultation of a behavioural expert or the institution's doctor (art. 25a YCIA). This option is meant for a situation in which there is a risk that the child might harm himself. *Parliamentary Documents II* 2003/04, 29 413, no. 3, p. 2.

⁵¹⁸ Cf art. 15 (2) Ministerial Regulation Disciplinary and Confinement Cell Youth institutions.

inform the institution's doctor, the supervisory committee and the child's parents or other carers immediately (art. 25 (6) YCIA).⁵¹⁹ The YCIA has not acknowledged the situation in which the child does not want to have his parents informed (see also para. 4.9.3.3; *cf* para. 4.8.6).

The legislator has provided three procedural safeguards regarding both exclusion and confinement: the child must in principle be heard in advance,⁵²⁰ he must receive the decision in writing in a language he understands, including information on the ways to challenge the decision and the measure must be registered (arts. 61 (1), 62 (1), 24 (5) and 25 (8) YCIA).⁵²¹

A significant change introduced by the YCIA was that the competence to make decisions regarding measures of order, necessary to restore order or safety or for the protection of the child, became part of the exclusive authority of the director.⁵²² The nature (and potential arbitrary use) of these grounds requires an objective judgment, which requires a certain distance. Such distance and/or objectiveness cannot be assumed to be present with staff members.⁵²³ However, there is one significant exception to the director's discretion (arts. 24 (3) and 25 (4) YCIA). If the presence of the director cannot be awaited, because immediate action is required, staff members are entitled to exclude a child from the group or group activities, or to place him in confinement for a maximum duration of fifteen hours. The director must be informed immediately and the child's hearing can take place afterwards (art. 61 (3) YCIA). This maximum duration does not mean that staff members can order the child's exclusion or confinement for fifteen hours. The nature of the measure, a measure of order, requires a regular check to judge whether the grounds still exist and immediate and continuous action is required in order to involve the director. Nevertheless, the law enables staff members to make arrangements for the situation where the director cannot be reached or involved immediately (i.e. sooner than fifteen hours, e.g. during the night).

The YCIA Evaluation revealed that many institutions work with the measure of 'time-out' – a measure of placement of the child in his room ('kamerplaatsing')

519 The YCIA does not provide similar safeguards regarding exclusion, which can be reasoned by the level of severity of both measures; exclusion is less far-reaching than confinement. Still, exclusion in one's room can last for a long time (the YCIA does limit the number of prolongations) and thus may amount to a form of isolation, which the legislator has tried to prevent regarding confinement. Moreover, confinement may be executed in the child's own room as well and therefore look very much alike.

520 If the child cannot be heard in advance, due to his state of mind or if immediate action is required, the director must hear him as soon as possible afterwards (art. 61 (3) YCIA).

521 In addition, copies of the written decisions of measures of order (if compulsory) must be put in the child's file (art. 67 YCIR).

522 *Cf* art. 4 (4) YCIA; see also para. 4.5. There are a few exceptions.

523 Explanatory Memorandum YCIA, p. 41.

ordered by a staff member for a short period (thirty or sixty minutes).⁵²⁴ It is considered a pedagogical response to the child to let him calm down or to restore order in the group. The YCIA does not explicitly provide for such a ‘time out’, but the Appeals Committee has categorized it as an exclusion in the event that immediate action is required and the presence of the director cannot be awaited (see above; art. 24 (3) YCIA). As a consequence the requirements, just mentioned, must be met.⁵²⁵ It is recommended to provide a specific legal basis for the ‘time-out’. This would enable staff members to exclude children from the group and place them in their rooms for a short period of time, as a pedagogical (non-punitive) measure.⁵²⁶

B. Confinement Elsewhere and Temporary Transfer

The other two measures, confinement in another institution or temporary transfer will not be addressed in detail, since they are used less (see below). Some remarks will be made.

If there are ‘serious objections’ to placing a child in confinement in the institution, the child can be transferred to another institution or department to be confined there; the same time limits and procedural safeguards apply as with regard to ‘regular’ confinement. The director must inform the child’s parents immediately (art. 26 (5) YCIA). The decision requires the consent of the selection official, who is responsible for the central selection and placement of children in youth institutions (see para. 4.7). ‘Serious objections’ have not been defined, but it is argued that one should think of a situation in which there is a serious threat of a breakout or hostage-taking.⁵²⁷

In the event of temporary transfer, the child is transferred to another institution if it is found necessary for the interests of order and safety in the institution or for the protection of the child (art. 27 YCIA). The maximum duration is fourteen days, which can be prolonged once. According to the Explanatory Memorandum the temporary transfer can be ordered as a reaction to unacceptable behaviour of the

⁵²⁴ YCIA Evaluation 2004, p. 162.

⁵²⁵ Appeals Committee, 13 August 2002, 02/0994/JA and Appeals Committee, 19 August 2003, 03/0381/JA. In the latter case staff ordered a time-out after the child had played one group leader off against another. The Appeals Committee ruled that no immediate action was required and that the measure consequently did not meet the requirements of art. 24 (3) YCIA. *Cf* Appeals Committee, 10 February 2006, 05/2329/JA for a comparable case, although the Appeals Committee in this case mistakenly referred to ‘time-out’ as if it were a form of confinement under art. 25 YCIA (referred to as ‘bewaardersarrest’, a term used under Dutch adult law).

⁵²⁶ YCIA Evaluation 2004, p. 191 and 194. Bartels also pleads for the introduction of the time-out as a measure of order. He argues that the legislator has led the scale tip to the juridification of the measures of order and that youth institutions should have the opportunity to send a child who misbehaves to his room for a short period of time; Bartels 2003, p. 177-178. *Cf* Annual Report, The Council 2005, p. 20 and Advice of the Council of 1 July 2003 (No. 20030911) ‘Advice Youth institutions’.

⁵²⁷ Doek & Vlaardingbroek 2006, p. 731.

child or for the protection of the child or others.⁵²⁸ This reveals a more disciplinary rationale behind this measure, which also explains why it was originally called a correctional placement.⁵²⁹ A temporary transfer is not easy, because it requires involvement of various persons (actors). The selection official and a behavioural expert must be consulted; the child must be heard. The Minister of Justice must consent if the measure concerns a child under a treatment order. Bartels argues that, regarding a child in pre-trial detention, the court or examining judge that has ordered the pre-trial detention must grant permission. In addition, the director must inform the child's parents immediately (art. 27 (5) YCIA). After this temporary placement the child must be transferred back to the institution where he came from (art. 27 (4) YCIA). This may *de facto* be problematic if the place in the meantime has been used to place another child, which is not unlikely given the shortage of places or if the institution requests reselection.⁵³⁰

4.9.3.3 Disciplinary Sanctions

Besides measures of order, the YCIA provides for disciplinary sanctions that can be imposed if the child commits behaviour that is incompatible with the institution's order or safety and for which he can be held accountable (art. 55 (5) jo. 54 (1) YCIA).⁵³¹ It distinguishes exhaustively⁵³² five disciplinary sanctions: disciplinary confinement (including confinement in another institution), exclusion from group activities, denial of visits, limitation, refusal or withdrawal of leave and a fine (arts. 55 and 56 YCIA).

The YCIA has reintroduced disciplinary sanctions, after their abolition in 1982. As mentioned in paragraph 4.1.5 their reintroduction was defended by the assumed increased maturity of the child, which justifies the child's personal responsibility for his acts. In addition, the legislator wanted to draw a clear line between disciplinary sanctions and (pedagogical) measures of order, which were *de facto* also used for disciplinary reasons.⁵³³

It seems that the reintroduction of disciplinary sanctions represented an increasingly punitive approach, also visible in the 1995 juvenile justice law review. On the other hand it can be seen as a recognition of the child as a holder of rights, since it delineates clearly the (legitimate) use of sanctions from pedagogical measures (i.e. measures of order) and provides legal safeguards, that are similar to

⁵²⁸ Explanatory Memorandum YCIA, p. 44.

⁵²⁹ *Parliamentary Documents II* 1998/99, 26 016, no. 2.

⁵³⁰ Bartels warns of a delay in the child's treatment programme if the child is transferred under either of the two measures of order; Bartels 2003, p. 178-179.

⁵³¹ The general principles of the capacity of being an offender/participant (in a crime) under art. 47 and 48 CrimCo are applicable in this regard; Explanatory Memorandum YCIA, p. 62.

⁵³² Explanatory Memorandum YCIA, p. 11.

⁵³³ Explanatory Memorandum YCIA, p. 61.

those regarding adults; the regulation regarding disciplinary sanctions is directly based on the regulation for adults.

Moreover, the increased punitiveness should be placed in perspective. First, the maximum duration of the disciplinary sanction of confinement (see below) is not longer than in, for example the 1965 Child Care and Protection (Framework) Act. Second, taking into account the second reason for the reintroduction of sanctions, one should not exclude that a certain punitive approach was already present, even though there formally were no disciplinary sanctions. This however is not directly supported by the available data. These show an overall increase of both measures of order and disciplinary sanctions (since 2001), which seems to point out that the introduction of disciplinary sanctions has not led to a decrease in the measures order (see below).

A. Disciplinary Confinement

The director can order the child's disciplinary confinement in a special confinement cell or other place.⁵³⁴ If the child is younger than sixteen the maximum duration is four days, regarding older children the maximum duration is seven days. The maximum duration of this disciplinary sanction is quite a bit longer than the measures of order exclusion or confinement, without an explicit justification. This enforcement of solitary confinement in principle takes place in the same institution or department. If there are 'serious objections' against the enforcement in the same institution or department or the enforcement is not possible there, the child can be transferred to another institution or department for the purpose of disciplinary confinement (art. 56 (1) YCIA).⁵³⁵

During disciplinary confinement the child does not participate in group activities, but he remains entitled to enjoy one hour of fresh air a day (art. 59 (1) YCIA). The director can limit the child's right to maintain contact with the outside world. As mentioned in paragraph 4.8.6 limitation of contact with privileged persons, such as the child's parents or lawyer is not excluded, and the justification is unclear.⁵³⁶ The YCIA does not provide the grounds of limitation of contact, but

⁵³⁴ This can be a confinement cell (meant for a measure or order) or the child's room; see, e.g. Appeals Committee, 23 December 2003, 03/1395/JA. *De facto* one often speaks of isolation cell or 'iso'. Children turned out to be not really aware of the difference between disciplinary confinement as a sanction and confinement as a measure of order, which is quite understandable given the thin theoretical line. In addition, children seem to experience both measures and sanctions alike; YCIA Evaluation 2004, p. 134.

⁵³⁵ Cf confinement elsewhere as a measure of order (art. 26 YCIA); again the selection official's approval is required; see art. 31 ff Ministerial Regulation Disciplinary and Confinement Cell Youth institutions.

⁵³⁶ The Appeals Committee has ruled that the child remains entitled to call his lawyer (based on art. 44 (4) YCIA) during disciplinary confinement (Appeals Committee, 6 June 2005, 05/0528/JA). Such a telephone call need not necessarily be related to the confinement; in this case the child wanted to call his lawyer for the preparation of his criminal case, while he was in confinement.

according to article 15 (2) Ministerial Regulation Disciplinary and Confinement Cell Youth institutions,⁵³⁷ contact with the outside world during confinement may only be limited if required by the order or safety in the institution or if the behaviour or physical or mental development of the child require to do so. This implies that limitation of contact should not be used for disciplinary purposes, unless it is through the lawful sanction regarding visits (see under C).⁵³⁸

If the solitary confinement lasts longer than 24 hours, the director must inform the institution's doctor and the supervisory committee (art. 59 (2) YCIA); the child's parents are not mentioned in this regard.⁵³⁹ The absence of an explicit reference to the child's parents in this provision has been reason for the Appeals Committee to rule that the director neither has the duty of care, nor the competence to inform the child's parents about his disciplinary confinement.⁵⁴⁰ This consequently implies that the director is not competent to inform the child's parents if the child is placed in disciplinary confinement in another institution (art. 56 YCIA; see para. 4.7.4). Due to the absence of any clarification it is not clear whether the Dutch legislator has deliberately excluded parents in this regard. This exclusion as such seems hard to defend, in particular compared to the inclusion of parents in article 25 (6) YCIA; it is questionable whether this distinction is justified. In addition, it may deprive parents from significant information on the development (and the whereabouts) of their child, which violates article 9 (4) CRC. In general, the YCIA pays no attention (neither in article 25 (6), nor in art. 59 YCIA) to the situation that a child does not want to have its parents informed, which may be particularly true in the situation where a child has been disciplined (see the above mentioned case). Nor does it not acknowledge that children may turn eighteen (the age of majority) during their stay in the institution.

Consequently, it is recommendable to change the law and to include the duty to inform the child's parents under article 59 (2) YCIA and also the recognition that the child must provide his permission (while taking into account his age and maturity).⁵⁴¹

The Minister of Justice has drawn up Ministerial Regulation Disciplinary and Confinement Cell Youth institutions providing specific rules regarding design of

⁵³⁷ Ministerial Regulation Disciplinary and Confinement Cell Youth institutions, 5113411/01/DJI, 14 August 2001, *Government Gazette* 2001, 156. Note that this regulation also regulates confinement as a measure of order.

⁵³⁸ Again, the director can order camera surveillance if required for the protection of the child's mental or physical condition and after consultation of a behavioural expert or the institution's doctor (art. 55a YCIA).

⁵³⁹ Unlike regarding confinement elsewhere as a measure of order (art. 25 (6) YCIA); see above.

⁵⁴⁰ Appeals Committee, 7 August 2003, 03/0379/JA. In this specific situation the child (i.e. a young adult of 18 years) complained that the institution should not have informed his mother, who was angry with him, because the institution found reason to discipline him.

⁵⁴¹ Regarding the latter part, art. 25 (6) YCIA should be adjusted as well.

these cells for confinement as a measure of order or disciplinary sanctions (see some references above). It also contains rules regarding the regime, such as rules regarding contact with the wider community, care (health, food, clothing, etc.), screening and health care, including (regular) compulsory visits of a doctor, youth psychiatrist or behavioural expert if there are medical or behavioural issues (art. 4 of the regulation). The regulation does not explicitly distinguish between a disciplinary cell and confinement cell (for the measure of order). *De facto*, the former is more *Spartan* than the latter. The design can differ from a room regarding size and windows; the regulation merely stipulates that daylight should enter the cell, while a room requires a window for daylight and view (see para. 4.8). In addition, the possession of personal affects is not allowed as a general rule (art. 16 of the regulation), which implies a serious limitation of the child's right to privacy and should have been regulated by law (i.e. in the YCIA), rather than in the lower administrative regulation. According to article 17 of the regulation the child has the right to receive reading materials.

Furthermore, the Regulation provides for compulsory screening of the child's body and clothes, which does not leave room for diversion or an assessment in light of necessity and proportionality (*cf* para. 4.9.2).

B. Exclusion from Activities

The second disciplinary sanction is exclusion from one or more group activities (art. 55 (1) (c) YCIA). This sanction does not deprive the child from his right to be in the group (*cf* exclusion as a measure of order). It merely affects his participation in (certain) activities. This sanction can also endure for a maximum of four days if the child is younger than sixteen, otherwise it can endure for seven days.

C. Limitation of Visits or Leave

The child's right to receive visits regarding one or more specific individuals can be limited for a maximum period of four weeks as a disciplinary sanction (art. 55 (1) (b) YCIA). The director can impose this sanction if a visit of these specific individual(s) has been the reason for a disciplinary reaction. One could think of the situation in which a child receives contraband with the help from a visitor.⁵⁴² The denial of visits from parents or other family members is not excluded in this regard, which is on strained terms with rule 67 JDLs and article 37 (c) CRC.

The fourth sanction is the withdrawal, limitation or refusal of the first right to leave the institution (art. 55 (1) (d) YCIA). It may only affect the first leave planned in the future and cannot lead to a denial of leave for a certain period of time and it may not lead to suspension of the child's reintegration programme.⁵⁴³

⁵⁴² One could raise the question whether this actually is not a measure of order.

⁵⁴³ Appeals Committee, 10 August 2006, 06/1997/SJA. This does not affect the fact that the institution could adjust the child's programme, by changing his residential or treatment plan.

D. Fine

The final disciplinary sanction is the fine. The director can fine the child the amount of the child's pocket money of one week maximum (art. 55 (1) (e) jo. 51 (3) YCIA). The director must also order the alternative sanction for not paying the fine.⁵⁴⁴

E. More than One Sanction – Suspended Sanctions

Although, the YCIA list of disciplinary sanctions is exhaustive, the director can impose more than one sanction. If the sanction of disciplinary confinement is imposed in combination with exclusion from group activities, the maximum duration of the combination may not exceed the duration of four or seven days, for children under sixteen or children of sixteen and older, respectively (art. 55 (3) YCIA).⁵⁴⁵

Furthermore, each sanction must be enforced immediately, although the director can (partly) suspend the sanction with an operational period of two months maximum (art. 55 (6) jo. 57 YCIA). If the director suspends the sanction the general condition that the child must not commit acts that are incompatible with the institution's order or safety is compulsory. The director is free to determine additional special conditions. If the child's violates (one of) the conditions, the director can order the execution of the suspended disciplinary sanction. The legislator expressed the expectation that this legal opportunity could be of particular pedagogical value.⁵⁴⁶ According to the YCIA Evaluation, however, the suspended sanction does not seem to be used frequently.⁵⁴⁷

F. Legal Safeguards

The director is exclusively competent to order a disciplinary sanction (art. 4 (4) YCIA). The YCIA does not provide any exception in this regard, unlike regarding measures of order where a staff member can order a temporary measure necessary if immediate action is required.

If the director finds a disciplinary sanction appropriate, he should order it as soon as possible after he has discovered that the child has been involved in such acts (art. 54 (2) YCIA). If a staff member witnesses these acts, he should make a written report⁵⁴⁸ and send it to the director, after having informed the child about his intention to do so (art. 54 (1) YCIA).⁵⁴⁹ Before the director orders a sanction he must

⁵⁴⁴ This sanction should not be confused with recovery of damages and a sanction does not prevent a child or his legal representative from being held liable for the damage sustained (see art. 55 (4) YCIA); it goes beyond the scope of this study to elaborate on this.

⁵⁴⁵ This should not be confused with a disciplinary sanction imposed after a measure of order; see, e.g. Appeals Committee, 24 April 2006, 05/2863/JA.

⁵⁴⁶ Explanatory Memorandum YCIA, p. 62-63.

⁵⁴⁷ YCIA Evaluation 2004, p. 163.

⁵⁴⁸ *De facto*, this often is a standard form; YCIA Evaluation 2004, p. 106-107. Standard forms are also used regarding measures of order.

⁵⁴⁹ The Appeals Committee has stressed this report's significance for the child's legal status; Appeals Committee, 23 December 2003, 03/1395/JA.

hear the child, a principle that cannot be set aside (art. 61 YCIA). The child must receive the director's decision in writing in a language he understands. This decision must also include information regarding the ways to challenge the decision (art. 62 (1) and (4) YCIA). Furthermore, the imposition of sanctions (or change or review of sanctions) must be registered (art. 58 (1) YCIA). In addition, the order must be included in the child's file (art. 63 (1) (f) YCIA).

The YCIA distinguishes between children younger than sixteen and children of sixteen and older regarding the imposition of disciplinary sanctions, in particular solitary confinement or exclusion.⁵⁵⁰ This is one of the few explicit references to differences between children according to age (and potentially maturity), although distinction by age is obviously arbitrary. It therefore remains important that the duration of the sanction is set, while taking into account the specific circumstances of the case, including the personal characteristics of the child.

Given the permitted placement of children under the age of twelve in youth institutions, the inclusion of another age group is defensible, that is: the group of children younger than twelve years. In addition, one could raise the question whether these children can be held accountable for their actions and whether they may be disciplined (*cf* the discussion regarding the MACR).

4.9.3.4 Some Observations and Critical Remarks in Light of International Human Rights Law and Standards

As mentioned before, International Human Rights Standards provide a legal framework for the use of disciplinary measures regarding children deprived of their liberty (see in particular rule 66ff JDLs). They provide the general principles, boundaries and some safeguards. Furthermore, they embody instructions regarding requirements of the domestic legal framework. However, the Standards do not provide detailed provisions regarding the imposition of disciplinary measures (*cf* para. 3.10).

After having addressed the YCIA provisions regarding measures of order and disciplinary sanctions, the conclusion is justified that the Dutch legislator has enacted legislation, largely in conformity with International Human Rights Standards, particularly with rules 68 and 66 JDLs. In essence, the YCIA forces institutions, when considering taking measures or imposing sanctions as addressed above, to ground them on individual decisions, generally made by the director, based on the criteria provided by the law.⁵⁵¹

The YCIA Evaluation revealed that institutions generally support the legislation in this regard, although not all measures or sanctions are used; the distinction

⁵⁵⁰ The same is true for exclusion or confinement as a measure of order.

⁵⁵¹ This rules out collective sanctions (see rule 67 JDLs). In addition, these decisions can be challenged by the child before a competent, impartial body (*cf* rule 70 JDLs).

between measures of order and disciplinary sanctions is not clear to everybody. The confusion in practice could be explained by the fact that, despite the legal and theoretical differences, some of the measures of order and disciplinary sanctions look very much alike. Furthermore, the procedural aspects are to some extent experienced as impractical (i.e. leading to increased administrative tasks and cumbersome procedures, particularly regarding the obligation to hear the child). Moreover, the fact that the main measures of order and all sanctions belong to the exclusive competence of the director is experienced to some extent as impractical, since it deprives staff members of the desired competence to respond immediately to disturbances of order or safety according to their pedagogical views. In this regard it is recommendable to provide the ‘time-out measure’ with a legal basis.⁵⁵²

Still, there are some remarks that must be made regarding the content of the YCIA.

First, it is interesting to note that International Human Rights Standards do not explicitly distinguish between disciplinary sanctions, measures of order or other variations of reactions concerning the interest of safety and order in the institution. Although, such distinction could be read into rule 66 JDLs providing that disciplinary measures could be used for the maintenance of the interest of safety and an ordered community life, they should at the same time contribute to the ‘fundamental objective of institutional care’, namely ‘instilling a sense of justice, self-respect and respect for the basic right of every person’. This seems to imply that disciplinary measures should not be merely retributive, but should have an educational purpose as well. Regardless of whether one approves the use of discipline and disciplinary sanctions in a youth institution as a reaction with pedagogical value,⁵⁵³ disciplinary sanctions have the risk of being (ab)used purely for retribution.

This is why the Dutch divide between measures of order and disciplinary sanctions is interesting. It distinguishes by nature in order to prevent abuse of pedagogical measures to punish children. In addition, there is a clear division of competences, which builds in a certain distance (i.e. objectivity) between the decision maker (i.e. director) and those who work with children on a daily basis. Although, one should acknowledge that the line between measures of order and disciplinary sanctions is thin and is also experienced as such by both institutions as well as children.⁵⁵⁴ The Dutch example points out that the distinction has benefits, but also that the distinction can be without effect if the differences are not clear to both staff and director and if it hampers practice due to administrative workload and lack of room for staff to operate (e.g. time-out).

⁵⁵² YCIA Evaluation 2004, p. 161-163 and 165.

⁵⁵³ Some Dutch institutions, e.g. reject the use of disciplinary sanctions for pedagogical reasons.

⁵⁵⁴ Even the Appeals Committee seems to have difficulties with the distinction; see e.g. Appeals Committee, 23 January 2007, 06/2695/JA.

It is furthermore important to reiterate that besides the legal options for the use of measures of order or disciplinary sanctions, staff and institutions' administrations can opt for less restrictive and far-reaching tools to communicate with or instruct children (art. 4 (3) YCIA; see para. 4.9.1). In essence, one should avoid the use of measures of order or disciplinary sanctions as much as possible. *De facto*, the use of the means to restore order and safety, or discipline children as a measure of last resort can be seriously questioned. According to tables 4.4 and 4.5 there has been a significant increase in the total number of disciplinary measures and sanctions since the introduction of the YCIA in 2001. In addition, the reintroduction of disciplinary sanctions has not led to a reduction of the number of measures of order. On the contrary, between 2002 and 2003 there has been an explosion of measures of order, in particular caused by the number of room placements. The absolute number of disciplinary sanctions has more than doubled between 2001 and 2006.

Table 4.4: Measures of Order, Disciplinary Sanctions and Temporary Transfers⁵⁵⁵

Year	Total numbers	Measures of order	Disciplinary sanctions	Temporary transfers	Total number per 100 occupied places
2006	8695	6150	2500	45	4317
2005	9334	6968	2316	50	4122
2004	9151	6438	2663	50	4163
2003	9680	8070	1561	49	4716
2002	4057	2788	1213	56	284.0*
2001	3856*	2771*	1085	-	2165
2000	2998	2998	-	-	1898
1999	3409	3409	-	-	2334

Source 1999 t/m 2001: DJI Planning & Control 1999-2001, p. 230 en 232;

Source 2002-2006: DJI Overview Figures Annual Reports 2002-2006 (unpublished).

*data corrected by the Ministry of Justice during the YCIA Evaluation (YCIA Evaluation 2004, p. 79).

⁵⁵⁵ The figures of 2005 and 2006 are based on fourteen youth institutions; one of the former fifteen institutions was closed down in April 2005. Disciplinary sanctions were reintroduced in 2001, when the YCIA entered into force. Regarding 2006 two institutions have not been taken into account; one institution has not been taken into account regarding 2004. Regarding 2002, three institutions have not been taken into account; these counted 1,144 measures of order and disciplinary sanctions in 2001. Regarding the year 2001 one institution has not delivered data; this institution counted 51 measures of order and disciplinary sanctions in 2002, according to the DJI Overview Figures Annual Reports 2002.

Table 4.5: Measures of Order: Placement in Room and Confinement (elsewhere)⁵⁵⁶

Year	Total number	Placement in room (> 4 hours; art. 24 (4) YCIA)	Confinement (elsewhere; arts. 25 and 26 YCIA)
2006	6150	4050	2100
2005	6968	5194	1774
2004	6438	4868	1570
2003	8070	6254	1774
2002	2788	-	-

Source: DJI Overview Figures Annual Reports 2002-2006 (unpublished).

A second remark affects corporal punishment (see also para. 4.5). Although it is not prohibited explicitly, it clearly is not permitted; it is not mentioned in the exhaustive list of disciplinary sanctions. The Minister of Justice has explicitly stressed that corporal punishment is prohibited. He also found it unnecessary, because the director has many other options to respond to the child's inappropriate conduct.⁵⁵⁷ In addition, corporal punishment is prohibited under article 37 (a) CRC, which is directly applicable (see para. 3.6). Moreover, article 1:247 (2) Civil Code, prohibiting any violence against children under parental custody, has also implications for the enforcement of the institution's task as carer and, thus, prohibits the use of violence, including corporal punishment, as a (pedagogical) measure.

Finally, a few critical remarks should be made here. First, the Dutch legislator has adopted two disciplinary sanctions that are on strained terms with International Human Rights Standards, namely disciplinary confinement⁵⁵⁸ and limitations of visits. Regarding the latter, limitations of visits from parents or family as a *disciplinary sanction* imposed on the child seems hard to defend under article 37 (c) CRC, which stipulates that the child has the right to maintain contact with his family, save in exceptional circumstances, which refers to the best interests of the child.⁵⁵⁹ Limitation of contact between the child and his parents or family is certainly defensible if there is, for example, reason to believe that they bring contraband (e.g. drugs or weapons) into the institution, which would jeopardize the order and safety in the institution. This should however be grounded on the general competence to limit contact between the parents and their child based on article 43 (3) CRC and not by disciplining the child; a disciplinary sanction is meant to address the child's culpable conduct; he should not be disciplined for conduct of his parents.

⁵⁵⁶ This table is based on the same sources as table 4.4. Therefore, the same remarks apply.

⁵⁵⁷ Explanatory Memorandum YCIA, p. 51.

⁵⁵⁸ The same is true for confinement as a measure of order.

⁵⁵⁹ This exception should not be used as a disciplinary measure; see rule 67 JDLs and Van Bueren 1995, p. 220.

Furthermore, the limitation or denial of the child's right to maintain contact with his family *during* the disciplinary sanction of confinement should only be allowed if required by the best interests of the child. Regarding other privileged persons, the denial of contact should be regarded as contrary to the objectives of granting these persons such a position and is on strained terms with article 37 (d) CRC; denial or limitation of contact with the child's lawyer is particularly in violation of this provision of International Human Rights Law.

Furthermore, (disciplinary) confinement (i.e. forms of solitary confinement) is on strained terms with International Human Rights Law and Standards. Rule 67 JDLs prohibits this form of disciplinary measure in rather firm wording by linking it explicitly and directly to cruel, inhuman or degrading treatment, which must be strictly prohibited. Although the JDLs have not defined closed and solitary confinement, the YCIA allows placement of children in special (disciplinary) confinement cells (either as a measure of order or as a disciplinary sanction), which apparently is hard to defend in this regard.

As mentioned before the YCIA regulation is based on the adult system, partly instigated because a child should be entitled to the same safeguards and approach, but the connection with adult law is somewhat overdone. Some distinction between the two forms of confinement is justified, since confinement as a measure of order could be based on the child's interests and since the YCIA explicitly stipulates that institution's administration must keep contact with the child. Disciplinary confinement as a sanction has a different (i.e. punitive) context and therefore is hard to defend. Moreover, the YCIA explicitly provides that the child's contact with the outside world, including the family, can be restricted. The tension with international standards is furthermore prompted by the Ministerial Regulation Disciplinary and Confinement Cell Youth institutions, which occasionally diverts from the YCIA regime for children in confinement, leading to a certain erosion of the quality treatment they are entitled to under this law.

Furthermore, the YCIA does not explicitly provide the '*ne bis in idem* principle', although this should be upheld according to International Human Rights Standards (see, e.g. rule 67 JDLs).

Finally, it is important to raise questions regarding the child's right to have his views heard regarding the decisions made that affect his legal status. The child must be heard by the director. In addition, the child must receive a written decision, including information on the possibilities to remedy the decision. The written decisions and hearing must be in a language that the child understands. This implies that the hearing must be in a child-friendly manner but also in a language he understands (which may require an interpreter). If the child is illiterate, he should receive the decision orally (or the written decision must be sent to his legal representative). The YCIA does however not include explicit instructions in this regard. Moreover, as pointed out before, the YCIA Evaluation revealed that many

institutions have no adequate tools for communicating with children who do not understand the Dutch language. This raises some concerns regarding the child's right to have his views heard (art. 12 CRC).

4.9.4 Conclusion

It is realistic to acknowledge that during deprivation of liberty there may be justified reasons to limit the child in (the enjoyment of) his human rights and fundamental freedoms. These reasons could best be categorized as measures to maintain an ordered and safe institutional climate. The institution's administration should have such legal measures to fulfil its task and to realize the objectives of a child's deprivation of liberty, which by no means should merely imply storage or security. Measures of order should contribute to a safe institution, but primarily because it benefits the pedagogical climate and eventually fosters the child's reintegration into society, where it can play its constructive role. International Human Rights Law and Standards provide the outer limits regarding measures of order and stipulate that the domestic legislator should draw up legislation regulating these measures of order, which can include use of force or restraint (including screening instruments) and disciplinary measures. This paragraph assessed the relation between legislation governing Dutch youth institutions, the YCIA, and the requirements of International Human Rights Law and Standards.

Despite some serious objections regarding the YCIA that deserve further attention (including the increase in the number of measures of order and disciplinary sanctions), the Dutch law clearly prescribes what is permitted, on which grounds, under which conditions and under whose authority. In essence it gives content to the conditions set by International Human Rights Law and Standards to provide the limitations with an explicit legal foundation, including rules regarding competences. The YCIA clearly represents such an approach, by providing a comprehensive regulation – maybe too comprehensively – but nevertheless thoroughly and largely in conformity with International Human Rights Standards. It forces the institution's administration to make individual assessments in each case and to make individual decisions (only if required), under important legal safeguards, including the right to challenge the decisions (see para 4.10). The YCIA presents a regulation which is generally respected even though sometimes found impractical or unclear, also for children, which stresses the need for education, training and information. This seems particularly true for the distinction between disciplinary sanctions and measures of order; a fair distinction but a complex and delicate one requiring special education and training. The lack of sufficient data, in particular regarding the use of force or restraint is rather worrying and deserves particular attention.

4.10 EFFECTIVE REMEDIES; INSPECTION AND COMPLAINTS PROCEDURES

4.10.1 Introduction

Two important components of the legal status of the child deprived of his liberty is the presence of independent inspection bodies and effective remedies to challenge unlawful or arbitrary treatment. Both can be regarded as vital elements in the protection of the child's rights and freedoms during deprivation of liberty. Their significance is *inter alia* prompted by the nature of the deprivation of liberty, that is: the child's placement in a non-transparent environment, in which he is dependent upon the institution's regime – a situation that makes him particularly vulnerable to abusive practices and unlawful infringements of his rights.

International Human Rights Standards have recognized the eminent importance of remedies and independent inspection and supervision, but – again – provide little guidance regarding implementation (see para. 3.11).

The Dutch legislator adopted specific rules in this regard in the YCIA and for example explicitly recognized the right of the child to file complaints. This paragraph successively elaborates on mechanisms of inspection and supervision, complaints procedures, including appeal and mediation, and special procedures, including requests and objections regarding placement, leave and reintegration programmes, and medical appeal.

4.10.2 Inspection and Supervision

4.10.2.1 Introduction

International Human Rights Standards (*inter alia* rule 72ff JDLs) provide that an independent inspection mechanism should be established. There should be an independent and qualified inspection body that is entitled to visit institutions regularly and unannounced, and conduct inspections regarding compliance with the law and regulations applicable. Inspectors should have unrestricted access to staff, children (with confidentiality) and records (rule 72 JDLs; GC No. 10, para. 89). In addition, they should report and if necessary make recommendations.

As just mentioned, besides these general outlines, there hardly is further guidance regarding the establishment of an inspection mechanism. As a minimum, inspectors (and the inspection body) should be qualified, duly constituted and not belong to the institution's administration. In the exercise of their task, inspectors should 'enjoy full guarantees of independence' (rule 72 JDLs). The establishment of an independent inspection mechanism contributes directly to the transparency of the institution's climate and compliance with the law and regulations.

The YCIA provides a number of provisions regarding independent inspection of Dutch youth institutions.

4.10.2.2 Supervisory Committee

Each youth institution must have its own supervisory committee ('commissie van toezicht'; art. 7 YCIA). *De facto* some institutions have more than one committee, because some departments have their own committee. The supervisory committee has a supervisory, judicial and advisory task. The committee's classical task, for children since the 1905 Child Laws, has been to supervise the enforcement of deprivation of liberty of children. In this regard the committee can provide the institution's director, the Council for the Administration of Criminal Justice and Youth Protection and the Minister of Justice with advice and information. Since 1984 the committee has been in charge of the complaints procedure; the complaints committee is composed of members from the supervisory committee. Since the entry into force of the YCIA the supervisory committee has also been in charge of mediation between child (and/or his parents) and the institution (see below).⁵⁶⁰

Article 7 (1) YCIA instructs the Minister of Justice to establish a supervisory committee for each institution or department of it, consisting of at least six people. The Minister also appoints and dismisses the members and appoints the chair (art. 15 (1) YCIR).⁵⁶¹ The Committee's composition should be as broad as possible and consist at least of a judge, a lawyer, a behavioural expert and a pedagogical expert. Although, the committee is not independently constituted, it does not fall under the responsibility of the Minister of Justice regarding the content of the work; the supervisory committee is free to perform its task. In addition, a member of the committee cannot be dismissed for the way he performed his task.⁵⁶² Moreover, a number of people cannot become a committee member, because their affiliation is incompatible with the membership of the committee. These include: civil servants or others working under the responsibility of the Minister of Justice,⁵⁶³ staff working in and around institutions or other professionals who are professionally involved (such as probation officers or family supervisors), individuals against whom there are objections against the fulfilment of the Council's specific tasks (confidentiality and independence) based on criminal or police records, for example, but not necessarily because they have been sentenced to imprisonment themselves before, and people working at the Council or Youth Care Inspectorate.

⁵⁶⁰ Explanatory Memorandum YCIA, p. 27.

⁵⁶¹ An appointment lasts for 5 years; a member can be reappointed twice; art. 14 YCIR.

⁵⁶² *Cf* art. 17 YCIR. A member can only be dismissed upon his own request, if he is convicted for felonies or because he accepts a position that is incompatible with the membership of the committee (see art. 16 YCIR). In addition, he can be dismissed should the confidence prove to be misplaced.

⁵⁶³ Public prosecutors are deliberately not excluded from this list, since their participation can be of added value, according to the Minister of Justice; Explanatory Memorandum YCIR, p. 47. However, they should not participate in the complaints committee if they have been involved in the criminal case of the child, who filed the complaint. According to the Minister the same applies to lawyers.

Members of the supervisory committee are entitled to visit the youth institution at all times and can access all places.⁵⁶⁴ They are also entitled to receive all information required for the performance of their task, including access to files of children, unless the child objects. The director is under the obligation to inform the committee about all relevant facts and circumstances; an outreaching duty, which is not limited to information upon request (art. 18 YCIR). Finally, members work on a voluntary basis and will not be paid by the Minister of Justice or institution. They receive a travel and subsistence allowance and an attendance fee.

Thus, the Minister can influence the initial appointment of members and the chair, and the prolongation of memberships,⁵⁶⁵ but has no competence to influence the committee's work. The committee's independence and impartiality in specific cases is furthermore to a large extent dependent upon the way the committee performs its tasks. It is determined by the committee's attitude towards the institution's administration and children during their visits, and towards the institution's administration during regular meetings.⁵⁶⁶ It is also determined by the way the committee positions itself in its relation with the Ministry of Justice. Under article 7 (4) YCIA the supervisory committee must regularly and personally contact children and acquire information about the children's 'wishes and feelings'. On the basis of rotation each member performs the task of 'supervisory official' ('maandcommissaris'). In this regard, the supervisory committee must hold a consulting hour at least twice a month, which must be made widely known to the children in time (art. 20 YCIR; *cf* art. 60 (2) YCIA).⁵⁶⁷

Furthermore, the supervisory committee in principle convenes once a month and the director attends these meetings, although the committee can meet without the director being present (art. 19 YCIR).⁵⁶⁸

It is difficult to provide a judgment regarding the committee's independence. Despite some worries,⁵⁶⁹ there are generally no reasons to suspect that the supervisory committees do not act independently, although in essence one does not

⁵⁶⁴ This includes places where reintegration programmes are enforced.

⁵⁶⁵ *De facto* the Minister merely approves a nomination of the committee and performs the examination of a person's antecedents and criminal record.

⁵⁶⁶ *Cf* YCIA Evaluation 2004, p. 172.

⁵⁶⁷ The YCIA Evaluation revealed that almost one third of the committee held one consulting hour a month; YCIA Evaluation 2004, p. 169.

⁵⁶⁸ The Minister can appoint one of his civil servants to join the meetings, which does not mean he can actively participate.

⁵⁶⁹ Some committees do not act independently from the administration of the institutions; see, e.g. Van der Laan *et al.* 2007, appendix 2 with reference to Council reports regarding 'Het Keerpunt' (2 September 2005) and 'Den Engh' (21 February 2006).

really know what the level of independency is and what the quality of the supervision is. This requires further research.⁵⁷⁰

In this regard it is important to improve the accessibility of *inter alia* the annual reports. The supervisory committees must provide an annual report, which must be sent to the Minister of Justice and the Council for the Administration of Criminal Justice and Youth Protection, but these are not publicly available; some committees turn out to have no annual report at all.⁵⁷¹

4.10.2.3 National Inspectorates

There are a number of relevant national inspectorates for youth institutions. Until 1 October 2006 the most significant national inspectorate was the Council for the Administration of Criminal Justice and Youth Protection (Council).⁵⁷² The Council was established on 1 April 2001 after a merger of the Central Council for the Application of Criminal Law (established in 1953) and Juvenile Custodial Institutions Advisory Board (established in 1955) and had three functions, as inspectorate, advisory body and judicial body. The function of inspectorate was transferred on 1 October 2006 to the Sanctions Inspectorate ('Inspectie voor Sanctietoepassing'), established on 1 January 2005 and part of the Ministry of Justice.⁵⁷³ It is too early to judge whether this change should be welcomed, in light of the quality of the inspection tasks regarding youth institutions and the requirement of independency. However, there are significant differences – some observations will be made.

The Council has conducted 47 visits to youth facilities since April 2001, approximately nine visits per year, resulting in reports on many aspects of institutional life, including the legal status of children. In addition, the members of the Council are appointed by the Crown and are hierarchically under the Minister of Justice.⁵⁷⁴ They are appointed on the basis of their professional expertise and societal knowledge and experience. Among the members are at least judges, lawyers, doctors, experts of social services and behavioural experts. A number of

⁵⁷⁰ See Kelk 2003, p. 66-67 for some remarks regarding the independence of supervising committees of adult institutions and references to research in this regard.

⁵⁷¹ During this study many committees were willing to send their reports upon request, but still the lack of public information is worrying. In addition, the decisions of the complaints committees are not published publicly (see below).

⁵⁷² The Council has three pillars one of which is the sector 'youth' that *inter alia* supervises youth institutions. The other two pillars are the sector 'prison system' and the sector 'treatment order'. For more info: www.rsj.nl (last visited 1 June 2008).

⁵⁷³ There was critique regarding the Council's double function, as inspectorate and as judicial body; see, e.g. Kelk 2003, p. 90-91 and Lünemann & Raijer 2004.

⁵⁷⁴ Although there are links with the Ministry of Justice, e.g. the secretariat is part of the department.

people are excluded from membership – a list comparable to those excluded from membership of a supervisory committee (see above).⁵⁷⁵

The Sanctions Inspectorate supervises the effectiveness and quality of the enforcement of the sanctions (including those leading to deprivation of liberty) and probation services.⁵⁷⁶ It particularly focuses on aspects of security and treatment of individuals in that regard. Second, it inspects compliance with the law and regulations.⁵⁷⁷ Unlike the Council, the Inspectorate represents a ‘one structure fits all approach’ (i.e. one inspectorate for all institutions, prisons, treatment clinics, etc. in the Netherlands) and has (on 1 January 2008) reported once on youth institutions, together with other inspectorates, following (allegations of) serious incidents in one of the youth institutions.⁵⁷⁸ This inspection report was a comprehensive and critical report, based on reports regarding each institution separately, and will be followed by ‘follow up’ inspections in 2008. Yet, it remains unclear how the Sanctions Inspectorate tends to work and whether it will conduct regular inspections, like the Council used to do, or that it will work on an *ad-hoc* basis.

The Sanctions Inspectorate proclaims to be independent, but it is part of the Ministry of Justice and its independence has been regulated by the Ministerial Regulation of Sanctions Inspectorate⁵⁷⁹ – not by statutory law. The regulation provides that the Sanctions Inspectorate is independent regarding a specific inspection. According to the explanation it then is free to choose its research method, to draw its conclusions and to report about the inspection. Another difference between the Sanctions Inspectorate and the Council, which is worth mentioning, is that the former works with professional inspectors, while the latter worked with experts appointed primarily on the basis of their expertise. Finally, the Sanctions Inspectorate publishes its reports on its website,⁵⁸⁰ which can certainly be seen as an improvement, because the reports of the Council have not been published widely.⁵⁸¹

The Council still has its other two tasks, the judicial task in the appeal procedures under the YCIA⁵⁸² and the advisory task under art. 3 (1) of the Act establishing the

⁵⁷⁵ Art. 5 Act establishing the Council for the Administration of Criminal Justice and Youth Protection.

⁵⁷⁶ Cf Kats, Kuipers & Sluijters 2007 for a first evaluation on the working methods of the Inspectorate.

⁵⁷⁷ Art. 3 Ministerial Regulation Implementation of Sanctions Inspectorate. In addition, it coordinates the activities of other inspectorates.

⁵⁷⁸ Youth Care Inspectorate *et al.* 2007; see para. 4.1.

⁵⁷⁹ Ministerial Regulation Sanctions Inspectorate, 22 August 2005, *Government Gazette* 2005, 166

⁵⁸⁰ See www.inspectiesanctietoepassing.nl (last visited 1 June 2008).

⁵⁸¹ The Council has not published its inspection reports, which certainly does not fit the Council’s public function and assumed independence.

⁵⁸² Art. 6 YCIA and art. 3 (2) Act establishing the Council for the Administration of Criminal Justice and Youth Protection (Act of 14 September 2006, *Bulletin of Acts and Decrees* 2006, 420).

Council for the Administration of Criminal Justice and Youth Protection.⁵⁸³ The task of the Council, Inspectorate and supervisory committees is currently subject to debate and under review, in particular regarding their independency.⁵⁸⁴

Other national inspectorates that are of significance for youth institutions are the Education Inspectorate, the Healthcare Inspectorate and the Youth Care Inspectorate. The last inspectorate was (and to some extent still is) of particular significance for children in youth institutions under the Youth Care Act (under child protection law), who are (and will be) transferred to institutions for closed youth care. It has the authority to inspect the (substantive) quality of (closed) youth care. This and the other inspectorates have tasks that affect the youth institutions as well, but they will not be addressed in this study.

4.10.2.4 Other Inspection Mechanisms

There are other mechanisms that supervise either directly or indirectly youth institutions and consequently contribute to transparency. First, the district courts have a supervisory task regarding the enforcement of their decisions and imposed sanctions. In addition, they ought to supervise the institutions' records and files. In this regard, the district courts can visit the institution unannounced and must inspect the institutions at least two times a year (art. 571 jo. 566ff CCP).

Furthermore, there are the other privileged individuals and authorities listed in article 42 YCIA, *inter alia* members of parliament, members of the Royal Family or representatives of the National Ombudsman, which can use their privileged position to gain (unsolicited) access to children in institutions (see para. 4.8.6).⁵⁸⁵

Finally, there are international organizations, including judicial authorities that ought to be considered as having a privileged position under article 42 YCIA, which can conduct inspections (and visits) to Dutch youth institutions as well. A fine example is the CPT that conducted visits to Dutch youth institutions in 1992 and most recently in June of 2007.⁵⁸⁶ The sub-commission of the (UN) CAT Committee could become a future inspection mechanism of significance as well, competent to

⁵⁸³ Note that the YCIA has not been changed yet; the Council still has its position as privileged authority and can, e.g. conduct visits to youth institutions at any time (art. 42 YCIA); the Sanctions Inspectorate has not been given this status yet.

⁵⁸⁴ Cf Motion Weekers-Çörüz of 23 February 2006, *Parliamentary Documents II*, 2005/06, 30 161, no. 10 and The Council, 'Uitwerking motie Weekers-Çörüz. Landelijke vergelijking en signaleren van trends op het gebied van de bejegening in de justitiële inrichtingen: een nieuwe opgave voor c.v.t.'s en RSJ', Memorandum of 4 July 2007 (further elaboration of Motion Weekers-Çörüz).

⁵⁸⁵ The National Ombudsman also has the authority to conduct research regarding complaints on issues in or around youth institutions; see below.

⁵⁸⁶ Although the CPT has visited the Netherlands, the Antilles and Aruba a number of times, it has visited youth institutions only three times (twice in 1992 and once in 2007).

conduct site visits under the Optional Protocol of CAT. However, the Netherlands has not yet ratified the protocol.

4.10.3 Right to File Complaints, Appeal and Mediation

4.10.3.1 Introduction

According to International Human Rights Standards the child deprived of his liberty should have the opportunity to make requests or file complaints to the director of the detention facility and in addition should have the ‘right to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay’ (Rule 76 JDLs). The standards leave it at the discretion of States to establish procedures in this regard. Particular attention deserves the confidentiality of complaints and the independency and impartiality of the authorities competent to receive requests and complaints. Although, the relevant standards are not very clear in their particular demands, safeguarding these elements is vital for the effectiveness of the right to make a request or file complaints (*cf* GC No. 10, para. 89; see for more details para. 3.11).

The YCIA contains a comprehensive set of complaints procedures with three components: mediation by the supervising official, filing of a complaint before the complaints committee (of the supervisory committee) and lodging an appeal before the Appeals Committee of the Council (Appeals Committee). The right to file complaints for youth institutions dates from 1984; mediation was newly introduced by the YCIA in 2001. In addition, each child is entitled to make formal requests or file objections, for example regarding placement (see para. 4.7) and he is entitled to make medical appeals.

The complaints procedures essentially revolve around the right of the child to challenge decisions that affect him before an independent authority, which judges whether that specific decision is in conformity with the (national and international) law and the principles of reasonableness and equity, and issues legally binding decisions.⁵⁸⁷ According to the Explanatory Memorandum the essence of the complaints procedures is that it offers legal protection to those deprived of their liberty, who find themselves dependent upon the institution authorities. In this regard it serves as ‘an assessment of the lawfulness and (...) quality of the institutions policy and fits in the general principle that the execution of sentences must take place in a manner that respects human dignity’.⁵⁸⁸

The supervisory committee has a central position in the complaints procedures. As pointed out above, one of its functions is the judiciary function. The complaints

⁵⁸⁷ Mediation does not result in legally binding decisions, but in recommendations to the director.

⁵⁸⁸ Explanatory Memorandum YCIA, p. 66-67.

committee consists of three members of the supervisory committee, assisted by a clerk (art. 67 (1) YCIA).⁵⁸⁹ As mentioned earlier, members of the supervisory committee visit the institution at least twice a month as supervising officials. These supervising officials also fulfil the function of mediator if the child exercises his right to request mediation (art. 64 YCIA).

In the following part of this paragraph the general and (some of) the specific characteristics of the complaints procedures (i.e. including appeal and mediation) will be addressed.⁵⁹⁰

4.10.3.2 The Right to File Complaints

Every child has the right to file complaints against any decision made by or on behalf of the director that affects him directly and individually (art. 65ff YCIA).⁵⁹¹ A complaint against a general rule is inadmissible.⁵⁹² This does however not exclude that lower regulations such as the internal rules can be reviewed in light of higher regulations such as the YCIA and YCIR.⁵⁹³ A child can also challenge decisions made by staff members on behalf of the director⁵⁹⁴ or by incompetent persons, for instance in the event a decision exclusively directed to the director was made by staff.⁵⁹⁵

A child cannot complain about overt acts ('feitelijk handelen'), such as yelling by staff members.⁵⁹⁶ This raises *inter alia* the question whether a child can file a complaint if he has been beaten up by staff. This strictly is an overt act; it is defensible that one categorizes this as an unlawful disciplinary measure, which can be remedied by filing a complaint. However, if it basically concerns an act of

⁵⁸⁹ The chair of the complaints committee preferably is a judge; art. 21 (2) YCIR. Given the composition of the supervisory committee, the complaints committee does not necessarily consist of lawyers only.

⁵⁹⁰ The right to file objections, to make requests and to lodge medical appeals will be addressed in para. 4.10.4 together with some other special procedures.

⁵⁹¹ This includes the refusal or omission to make a decision; art. 65 (2) YCIA.

⁵⁹² Such as a complaint against a smoking ban (Appeals Committee, 2 July 2003, 03/0351/JA) or against general adjustments in the daily programme, e.g. school hours (Appeals Committee, 19 November 2003, 03/1511/JA).

⁵⁹³ The Minister of Justice found this of particular importance given the institution's competence to draw up internal rules; Explanatory Memorandum YCIA, p. 69. *Cf* Appeals Committee, 27 November 2003, 03/2120/JA in which the Appeals Committee ruled that the internal rules were in conflict with the YCIR; the former provided that the supervising official visits the institution once a month, while the latter provides for at least two visits a month.

⁵⁹⁴ Explanatory Memorandum YCIA, p. 68; *cf* Appeals Committee, 24 February 2003, 02/2093/JA.

⁵⁹⁵ Explanatory Memorandum YCIA, p. 68-69; *cf* Appeals Committee, 7 August 2003, 03/0693/JA and Appeals Committee, 4 March 2002, 01/2222/JA. The same seems to be true regarding decisions that should (under the YCIA) be taken individually, but are applied systematically (e.g. systematic body search before and after visits; *cf* para. 4.9).

⁵⁹⁶ Or the order to play beach volleyball on bare feet as in Appeals Committee, 27 November 2003, 03/2120/JA.

general treatment (like, e.g. consistent bullying by staff members of one or more specific children), a complaint will most likely be inadmissible. The child can only resort to mediation (as will be addressed below).

Furthermore, the complaints procedure is designed for the child to remedy acts of staff or the director of the institution and not to solve issues between children. It is however not excluded that a child can file a complaint against the (implicit) decision of the institution's administration not to respond to such issues or to respond to a child's informal request to mediate between children.

A. Filing Complaints – Notice of Complaint

If a child wants to complain formally, he must file a complaint with the complaints committee. The notice of complaint must mention as exactly as possible the decision the child is complaining about and why (i.e. the notice must be reasoned). The threshold for filing complaints should not be too high. In essence, it must be clear against which decision the child is complaining and it is at the complaints committee's discretion to cope with the demands of clarification. According to the Minister of Justice a complaint regarding an alleged infringement of the child's physical integrity (e.g. regarding a body search) may require less clarification than one against a decision concerning visits.⁵⁹⁷

In addition, one should take into account the fact that children may not be capable of filing complaints or reasoning their notice of complaints, due to their age and maturity or incapability to understand or speak the Dutch language. If relevant, children are entitled to file a complaint in their own language (art. 66 (4) YCIA) and have the right to be assisted by an interpreter during the complaints procedure (art. 70 (2) YCIA).⁵⁹⁸ In addition, the YCIA does not differentiate regarding the age of children; all children, regardless of their age and maturity, have legal capacity to file complaints (or to make use of any of the other legal procedures). Furthermore, each child is entitled to legal or other representation (confidential counsellor; art. 70 (1) YCIA).⁵⁹⁹ Finally, the child's parents, guardian(s) or step or foster parents can file a complaint on behalf of their child (art. 80 YCIA).⁶⁰⁰

⁵⁹⁷ Explanatory Memorandum YCIA, p. 70. Although this specific example is questionable, it, i.e. implies that the threshold regarding such serious allegations need not to be too high.

⁵⁹⁸ One of the few explicit references in this regard. The chair of the committee can decide to translate the notice of complaint. In addition, it is vital for these children that they must be made fully aware of their legal status and in particular of the decision made against them. The written notice they have to receive based on art. 62 YCIA, with information on their right to file complaints, must be drawn up in an understandable language as well.

⁵⁹⁹ This assistance should be appointed by the committee, which implies that the child should have filed a complaint first. As mentioned above, the YCIA does not explicitly provide legal and other appropriate assistance during the child's (entire) stay in a youth institution (*cf* art. 37 (d) CRC).

⁶⁰⁰ The same is true for the other legal procedures. Although the YCIA is not clear on this, the jurisprudence of the Appeals Committee indicates that parents have an independent right to lodge complaints, object to placements, etc. See Appeals Committee, 5 June 2003, 03/0911/JA in which the child's guardian had filed objections (and appeal) without the child's consent which were held

The YCIA has not set the form of the notice of complaint; each notice that can be recognized as a notice of complaint will be treated as such.⁶⁰¹ Youth institutions often work with standard forms which can be used to file and reason a complaint. The YCIA does not provide guidance in the event that a child is illiterate. It may be assumed that a child should receive assistance, without prejudice, influence or censorship, and that he should be enabled to inform the complaints committee that he wishes to complain and to clarify his complaint orally. The YCIA could have provided specific safeguards in this regard.

A complaint must be filed within seven days after the challenged decision was made or after the child became aware of the decision. It falls within the director's duty of care to enable the child to exercise his right to file a complaint; the institution must in other words facilitate filing complaints (art. 65 (3) YCIA). Some institutions provide a 'complaints box' in which a child can drop his notice of complaint. Moreover, as mentioned before, some decisions require decisions in writing, including information on how to file a complaint (art. 62 YCIA). If a child is too late, the complaint can still be admissible if the child has not been in default (art. 66 (5) YCIA).⁶⁰²

The institution's administration may neither censor the complaint, nor try to persuade the child not to file a complaint or to withdraw one. The right to file a complaint is a *right* directed to the child and he has the sole discretion in this regard. The Appeals Committee particularly pointed at this vital principle in a case in which a child had not received a form for filing complaints, because his mentor concluded, after a conversation with the child, that the child no longer wished to complain. The child however contested this and the Appeals Committee ruled that if a child wishes to file a complaint, he must be enabled to do so.⁶⁰³

B. Procedure before the Complaints Committee

Rules regarding the procedural aspects of the right to complain can be found in articles 67, 68 and 69 YCIA. Although the threshold to complain should not be too

admissible because there were no important interests of the child to be protected by objecting to the guardian's actions. No explicit reference has been made however to the child's evolving capacities, neither in the jurisprudence, nor in the law, while both children and young adults can stay in youth institutions. Regarding mediation, the parents also have an independent right to request mediation based on art. 64 (8) YCIA. This right however also implies that parents can request mediation regarding acts or decisions that affect them directly; see below.

⁶⁰¹ Appeals Committee, 30 December 2003, 03/2236/JA.

⁶⁰² See, e.g. a case in which the complaints box was broken and the institution by mistake had forgotten to send the notice to the complaints committee; the child was admitted; Appeals Committee, 8 August 2002, 02/1226/JA. *Cf* Annual Report The Council 2005, p. 20 in which the Council noted that *de facto* there sometimes are practical barriers to the filing of complaints, for example, if children have to file their complaints via the group leaders and children fear that their complaints will not reach the complaints committee.

⁶⁰³ Appeals Committee, 28 February 2002, 01/2190/JA.

high, the notice of complaint must be clear enough for the director and the complaints committee to understand the nature of the complaint. This is important because the director must be able to prepare his response. It also is important because the (chair of the) complaints committee can conduct a ‘preliminary test’, a test which serves the following procedural aspects. First, the committee’s chair can decide that the case will be dealt with by one member of the complaints committee, if he finds reason in the case’s simple nature or if the complaint is manifestly inadmissible, manifestly unfounded or manifestly founded (art. 67 (2) YCIA). Second, the complaints committee can decide not to hear the child and director, if it regards the complaint as manifestly inadmissible, manifestly unfounded or manifestly founded forthwith. Finally, the preliminary test can be of significance for the complaints committee’s competence to refer the complaint to the supervisory official for mediation (art. 68 (4) YCIA; see below).

However, the preliminary test must be used reticently. Although it can be regarded as useful in light of efficient procedures, one should be cautious and not misjudge the merits of the case. This is particularly true regarding the ruling that the complaint is manifestly unfounded. If there is any uncertainty or non-clarity the complaint should not be settled in the preliminary phase. One should always exercise due care.⁶⁰⁴

The procedure basically consists of two parts. The first part of the procedure is a written procedure (art. 68 YCIA). The secretary of the complaints committee sends a copy of the notice of complaint to the director who is invited to comment or to provide additional information. After the reception of the director’s reaction the child will be informed of it in writing. The second part is the hearing (art. 69 YCIA). Both the child and the director are invited⁶⁰⁵ to make oral comments on the notice of complaint and to respond to each other’s position. The complaints committee can hear the child and the director separately and can also hear third parties or invite these to provide information.⁶⁰⁶

The hearing of the case must in principle take place *in camera* (art. 67 (4) YCIA). Only if the complaints committee finds that such a hearing is incompatible with international treaty law (i.e. art. 6 ECHR, according to the Minister of Justice), it can decide to hold a public hearing. According to the Minister of Justice the complaints procedure will not fall under the scope of article 6 (1) ECHR. He argues

⁶⁰⁴ Explanatory Memorandum YCIA, p. 69-70; *cf* Van Vliet 1997, p. 75. Note that a child can lodge an appeal.

⁶⁰⁵ A child is not obliged to be present; see, e.g. Appeals Committee, 2 October 2002, 02/1625/JA in which a child sent the committee a letter stating that he would not use the opportunity to outline his appeal.

⁶⁰⁶ The child and director must be informed of the outcomes of these inquiries. If the child has meanwhile been transferred to another institution, the complaints committee of the previous institution is competent to hear the complaint. However, it can ask the complaints committee of the current institution to conduct the hearing (art. 70 (4) YCIA).

that although disciplinary sanctions could be considered ‘criminal penitentiary offences’, they are not substantial enough (i.e. they are limited in time) to consider article 6 ECHR applicable to the complaints procedure in this regard; the procedure will in general not imply a ‘determination of any criminal charge’. Article 6 ECHR may, however, be applicable regarding issues affecting civil rights, e.g. in issues of personal property or actions to repair damages. If the complaints committee finds article 6 ECHR applicable, a public hearing must be held, according to the Minister, although he acknowledges that in such case exceptions could be founded on the interests of the child and interests of the protection of their privacy (art. 6 (1) ECHR).⁶⁰⁷

In this reasoning the Minister fully disregards article 40 (2) (b) (vii) CRC, which demands that the child’s privacy must be ‘fully respected at all stages of the proceedings’ (*cf* GC No. 10, para. 65 and art. 16 CRC). Although the YCIA represents an approach that is ‘*in camera*, unless...’, which respects article 40 CRC, the reasoning of the Minister of Justice seems to undermine this. In this regard it would have been better to use the wording of article 495b CCP instead, that is that the complaints committee can ‘order a public hearing if it finds reason to do so in public interests, which should in the specific case be given more weight than the protection of the privacy of the child’.

Still, article 67 (4) YCIA implies that the complaints committee must explicitly decide upon a public hearing; a decision which forms part of the decision upon the complaint, which can be appealed against by the child.

Furthermore, the committee’s decision should be made public, although anonymously (art. 72 (7) YCIA). *De facto*, it turns out to be particularly difficult to find complaints committees’ decisions; they are not published (unlike, e.g. decisions of the Appeals Committee; see below). This inaccessibility does not only disregard the YCIA, it also disregards the significance of publication of the decisions for a judgment on the quality of the legal remedies available to children and for information on the quality of treatment of children in youth institutions (i.e. transparency). Although there are no signs that the quality of complaints committees’ decisions would not be acceptable, it is, due to this invisibility impossible to provide for any substantive judgment in this regard. This largely applies to the annual reports of the supervisory committees as well (see para. 4.10.2). It is therefore recommendable to change the publication policies and provide (anonymous) publications of decisions, annual reports and other relevant documents. This can also contribute to the exchange of information between supervisory committees.⁶⁰⁸

⁶⁰⁷ Explanatory Memorandum YCIA, p. 71-72.

⁶⁰⁸ The national centre of expertise of the supervisory committees could offer a platform in this regard, for example through their website: www.commissievantoezicht.nl, last visited 1 June 2008.

C. Suspension of the Challenged Decision

The child can request suspension of the challenged decision. This request must be submitted to the chair of the *Appeals Committee*. He can order the suspension after hearing the director. The child must have an interest to suspend the decision and obviously the decision must still be suspendable.⁶⁰⁹

The Minister of Justice has deliberately chosen a full provisional remedy. Given the far-reaching nature of the decision of suspension he found it necessary to safeguard that such decision is made by someone that has the required professional skills to maintain the required distance. He admitted that for (practical) reasons the competence to suspend a decision could have been directed to the chair of the complaints committee. However, given the fact that there may not always be a judge available to act in this regard, for example in a holiday period, he decided to direct the competence to the chair of the Appeals Committee, which can always be judge.⁶¹⁰ *De facto*, this legal option is hardly ever used.⁶¹¹

D. Decision

The complaints committee must deliver its judgment as soon as possible, but within four weeks after the receipt of the notice of complaint (art. 72 (1) YCIA).⁶¹² The complaints committee can rule that the child's application is inadmissible, for example if he has not filed a complaint against a decision that affects him directly and individually or if he has lodged his complaint too late. If the child's application is admissible the complaints committee verifies whether the decision is in conformity with the YCIA or international treaties that are binding in the Netherlands. In addition, the complaints committee can also assess the complaint in light of the principles of reasonableness and equity (art. 73 (2) YCIA).⁶¹³ The legislator has chosen for an alternative formulation, which implies that a decision can violate the law, but is nevertheless found reasonable or equitable.⁶¹⁴

Based on this assessment the complaints committee can either rule that the complaint was (partly) founded or (partly) unfounded (art. 73 (1) (b) and (c) YCIA). In the event that it rules that the complaint was founded, it can order the director to

⁶⁰⁹ Cf e.g. Appeals Committee, 25 March 2002, 02/0648/SJA.

⁶¹⁰ Explanatory Memorandum YCIA, p. 70.

⁶¹¹ In 2007 the Appeals Committee received 12 requests for suspension of decisions of the director or the selection official; Annual Report The Council 2007, *Op het juiste spoor*, The Hague, p. 45. In 2006 there were 6 requests (Annual Report The Council 2006, *Niet loslaten*, The Hague, Appendix 'Productieoverzicht', p. 2); in 2005: 7 (Annual Report The Council 2005, p. 49); in 2004: 3 (Annual Report The Council 2004, p. 37); in 2003: 0 (Annual Report The Council 2003, p. 46).

⁶¹² This term can be prolonged in exceptional circumstances only; the legislator has not provided any clarification in this regard. The law does not contain a sanction (e.g. nullity) if the term is violated.

⁶¹³ In some cases the Appeals Committee assessed whether the institution acted with 'due care'; Appeals Committee, 6 June 2003, 03/0911/JB, Appeals Committee, 30 June 2003, 02/2309/JA and Appeals Committee, 27 March 2003, 02/2671/JA.

⁶¹⁴ See, e.g. Appeals Committee, 6 January 2003, 02/2087/JA.

make a new decision, it can make a decision itself instead or it can just repeal the decision (art. 73 (2) YCIA).

The decision must contain, besides the complaints committee's reasoned and dated judgment, a report on the hearings, information regarding the right to appeal against the decision (including information on the procedure and terms) and possibility to request suspension of the enforcement of the decision in the first instance (art. 72 (3) YCIA).

If the child does not understand or not speak the Dutch language, the chair of the complaints committee has the duty to provide a translation (art. 72 (4) YCIA). Obviously, the complaints committee should take into account the fact that the child must understand the decision and should therefore try to avoid the use of (formal) language that may hamper the child's understanding. Both the child and the director must receive a copy of the decision. The complaints committee can also give its decision orally; those involved must be informed accordingly (art. 73 (5) YCIA).

E. Compensation

The repeal of the director's decision implies that he must restore the legal effect. If that is not or no longer possible, for example because the challenged decision affected a disciplinary sanction that has already ended, the complaints committee can determine compensation (art. 73 (7) YCIA).⁶¹⁵ This can be financial compensation, which is particularly meant for repealed decisions leading to (disciplinary) confinement,⁶¹⁶ but it can also be compensation in another form, such as a movie night or a pizza dinner for the group, additional sports activities or additional telephone calls.⁶¹⁷

The Appeals Committee has ruled that the criteria for the amount of compensation are the 'missed facilities or activities'. It has also argued that three elements should be taken into account when determining the nature of the compensation. First, the compensation should have a certain pedagogical significance. Second, it should preferably be non-financial compensation. Third, it should meet the individual wishes of the child as much as possible.⁶¹⁸ Obviously, there may be tension between the first and the third elements. In this regard the Appeals Committee once ruled that the compensation must fit the nature and content

⁶¹⁵ Compensation under article 73 (7) YCIA is not the same as compensation of damages, which the child suffered due to decisions (taken on behalf) of the director; see, e.g. Appeals Committee, 12 February 2004, 03/2796/JA.

⁶¹⁶ Explanatory Memorandum YCIA, p. 71.

⁶¹⁷ Bartels 2003, p. 176.

⁶¹⁸ Appeals Committee, 19 November 2003, 03/1608/JA. In a case where compensation was granted to children for not being allowed in the group for the legally required period of time due to staffing problems, the Appeals Committee disapproved of the compensation of 'placement in a room with a television' because it would stimulate 'passivity'. The committee found financial compensation of €2.25 per day more appropriate, although it stressed that one must prefer non-financial, pedagogical compensation.

of the rightfully challenged decision.⁶¹⁹ Finally, it is interesting to note that although the Appeals Committee does not favour financial compensation, its case law includes mostly financial compensation.⁶²⁰

4.10.3.3 Right to Appeal

Both child and director have the right to appeal against a complaints committee's decision before the Appeals Committee of the Council (art. 74ff YCIA).⁶²¹ A reasoned notice of appeal must be filed within seven days after receiving the written decision of the complaints committee or after the day of the oral decision.⁶²² The notice must point out at which part of the decision the appeal aims. A child may for example consent to the decision (if founded), but disagree with the compensation. The appeal procedure before the Appeals Committee will then be limited to this specific part of the decision, unless the director appeals against the decision. According to some jurisprudence the Appeals Committee does not seem rigid if the details of appeal are not (fully) clear at the time of lodging the notice of appeal. If the child clarifies his appeal during the hearing he can very well be admitted.⁶²³

The appeal procedure is more or less similar to the procedure before the complaints committee. The lodging of an appeal does not suspend the committee's decision *ipso jure*, but the chair of the Appeals Committee can (partly) suspend it upon request. Before deciding, he must hear those involved and if he grants the request he must inform both child and director (art. 75 (2) YCIA).⁶²⁴

The YCIA does not provide the term in which the Appeals Committee should make a decision. Article 76 (1) YCIA merely provides that the Appeals Committee must give a written judgment 'as soon as possible'. The Appeals Committee can declare the appellant's appeal inadmissible. If the appellant's appeal is admissible the Appeals Committee can (partly) confirm the decision of the complaints committee, with or without correction of grounds, or can set aside the decision (art.

⁶¹⁹ Appeals Committee, 11 November 2004, 04/1828/JA. In this case the Appeals Committee ruled that because the child refused a reasonable offer for compensation, he was not entitled to other compensation.

⁶²⁰ For an impression see Liefwaard 2005, p. 136-138. If financial compensation is granted, it should be rewarded at the moment the child leaves the institution, in order to avoid big differences in children's financial positions; Appeals Committee, 24 September 2003, 03/0349/JA.

⁶²¹ The Appeals Committee consists of three members of the Council, assisted by an official secretary; art. 74 (2) YCIA. The YCIA does not provide a procedure before a single judge. Given the composition of the Council the Appeals Committee, like the complaints committee, does not necessarily consist of lawyers only.

⁶²² If the child and/or director lodges an appeal, the oral decision must be worked out as a written decision.

⁶²³ Appeals Committee, 6 February 2004, 03/2209/JA; Appeals Committee, 6 February 2004, 03/2885/JA. The child also has to reason his appeal; see Appeals Committee, 6 February 2004, 03/2886/JA and Appeals Committee, 4 August 2004, 03/0271/JA.

⁶²⁴ Note that this suspends the complaints committee's decision, but not the director's initial decision.

76 (2) YCIA). If it does repeal the decision in the first instance the Appeals Committee must do what the complaints committee should have done, which implies that the former should make a new decision on the complaint (art. 76 (3) YCIA).⁶²⁵

In general, the Appeals Committee seems to fulfil its task as the highest judicial instance well, which is of direct significance for safeguarding the legal position of children deprived of their liberty.⁶²⁶ This leaves unaffected the fact that further research regarding the quality of the Appeals Committee's jurisprudence under the YCIA is recommendable.⁶²⁷

In this regard it is important to note, that unlike the complaints committees (see above), the Appeals Committee publishes significant decisions on its website.⁶²⁸ Although the selection is conducted by (the secretariat of) the Appeals Committee itself, it contributes to information on the jurisprudence.

4.10.3.4 Some Further Remarks regarding the Right to File Complaints and Appeal

The YCIA provides a comprehensive complaints procedure that entitles a child placed in a youth institution to remedy decisions that affect him directly and individually before an independent and impartial authority, including the right to appeal. The general conclusion is that the complaints procedure seems to cause little problems in practice and is supported by both institutions and supervisory committees. At the same time one must conclude that the procedure is rather complex and formal (see also below regarding mediation), which may be particularly problematic for children⁶²⁹ and stresses the need for (legal) assistance; although the children, in general, are aware of their right to file complaints and know how to start the procedure. It is, however, questionable whether they are well (or: sufficiently) informed about their right to complain and the complaints procedures.⁶³⁰ In addition, the procedure takes too long, on average five to six weeks (while the legal term aims at four weeks).⁶³¹

Furthermore, the YCIA Evaluation showed that there was a general feeling among the institutions' directors and unit leaders that the number of complaints had increased since the introduction of the YCIA.⁶³² This contributed to the general

⁶²⁵ See above for the possible decisions. Although the YCIA does not provide this, the Appeals Committee made an interlocutory judgment in Appeals Committee, 25 November 2002, 02/1426/JA.

⁶²⁶ Lünemann & Raijer 2004, p. 53 and 94-95.

⁶²⁷ During this study some critical remarks have already been made (see above).

⁶²⁸ See www.rsj.nl, last visited 1 June 2008.

⁶²⁹ See, e.g. YCIA Evaluation 2004, p. 171.

⁶³⁰ The right to appeal seems to be rather unknown; YCIA Evaluation 2004, p. 132-133.

⁶³¹ YCIA Evaluation 2004, p. 170-171.

⁶³² An impression to some extent supported by the supervisory committees; YCIA Evaluation 2004, p. 171.

overall impression noticeable that the YCIA has led to juridification of the regime of youth institutions, which was considered to be on strained terms with the pedagogical objectives of institutions (see para. 4.5). In this regard, some respondents of the YCIA Evaluation argued that children exercise their right to complain too easily, which seems to be supported by an increase in the number of complaints in the first years after the entry into force of the YCIA (see also tables 4.6 and 4.7). Even though the right to complain was not introduced by the YCIA; it dates from 1984.

Table 4.6: Total Number of Decisions upon Complaints⁶³³

Year	Final decisions	Final decisions per 100 occupied places	Complaints founded	Complaints founded per 100 occupied places
2006	1083	466	287	124
2005	1060	468	377	166
2004	2753	1252	1808	822
2003	2184	1064	777	379
2002	1470	776	517	273

Source: DJI Overview Figures Annual Reports 2002-2006 (unpublished).

Table 4.7: Total Number of Complaints and Decisions

Year	Complaints filed	Complaints withdrawn	Complaints inadmissible	Complaints unfounded	Complaints founded
2005	2368	1379	-	-	374
2004	3190	1623			512
2003	3286	1400	-	-	576
2002	2158	1596	-	-	507
2001	1686	719	193	376	398
2000	1263	415	96	352	400
1999	1341	340	130	449	422

Source 1999-2002: Planning & Control 1999-2001, p. 14-15, 230 and 232 / YCIA Evaluation 2004, p. 84; Source 2002-2006: Additional information from DJI (upon request).

Unfortunately, the data in table 4.6 from the annual reports of youth institutions, collected by the National Agency for Correctional Institutions, does not provide (anymore) the total numbers of complaints filed by children. Based on the YCIA

⁶³³ The data of the years 2005 and 2006 are based on 14 institutions; the other years cover 15 institutions. In 2006 one institution registered 0 decisions regarding complaints. In 2004 one institution was responsible for 1,389 decisions upon complaints, of which 1,295 were founded. This institution was closed in April 2005.

Evaluation and further inquiries at the National Agency⁶³⁴ table 4.7 has been drawn up.⁶³⁵ Nevertheless, it can be assumed that the number of filed complaints is higher than the number of final decisions; a significant number of complaints are withdrawn. The reasons for these withdrawals are not clear, but they could be the result of successful mediation. However, due to the absence of specific figures regarding mediation, one does not actually know whether this is true. The absence of clarity in this regard is worrying because it is vital to have information on the motives of children to withdraw their complaints. The possibility that children withdraw complaints out of fear for repercussions or after pressure from the institution should be excluded; appropriate and disaggregated data is vital in this regard (see also para. 3.13).

The data in table 4.7 furthermore seems to confirm the increase of filed complaints after the introduction of the YCIA,⁶³⁶ although the recent figures show a decrease. It is not easy to provide the causes of the increase of complaints. It arguably is caused by a combination of factors, including *inter alia* the increase in the number of children in institutions and an increased attention to the complaints procedures in daily institutional life, since the introduction of the YCIA. In addition, one cannot exclude the fact that the way (staff and directors of) institutions operate has also contributed to the increase in the number of complaints.

The Minister of Justice has expressed the expectation that the complaints procedures would be of particular value if they contributed to the solving of relevant issues that could not be solved in another way than through the complaints procedures. Therefore, the point of departure should be that cases should be determined as fast as possible and as informally as possible.⁶³⁷ While this principle of last resort certainly is of particular value regarding the resolution of disputes in institutions, a different approach may be required regarding the complaints procedure as an instrument for the child to challenge violations of his human rights and fundamental freedoms (i.e. the primary objective under International Human Rights Law and Standards; see para. 3.11). In this regard the last resort principle could be upheld, as long as this does not imply that a child remains deprived of his right to legal protection through legal remedies before a competent and above all, independent

⁶³⁴ See Paulus 2007; for this research DJI has presented different figures over the years 2000-2002 than the ones published in the DJI Planning & Control survey 1999-2001 and used in the YCIA Evaluation 2004 (and in table 4.7).

⁶³⁵ In general, data regarding the complaints procedures turns out to be rather unreliable. There are, e.g. significant differences between the data from the annual reports of the institutions and those of the supervisory committees. In addition, the available data is not very satisfying because it provides little disaggregated information (e.g. specific data regarding mediation is absent); see also YCIA Evaluation 2004, p. 93 and 95.

⁶³⁶ See also the conclusions of the YCIA Evaluation 2004, p. 84-86.

⁶³⁷ Explanatory Memorandum YCIA, p. 67.

authority. In other words, one should distinguish between the function of the complaints procedure as a legal safeguard for children deprived of their liberty against (serious) violations of their human rights, and the function of the complaints as a means to settle disputes between the child and institution's administration, including issues of a more general nature.

Regarding the latter function (instrument for dispute resolution) the last resort principle is of significance and can prevent 'abuse' or unnecessary use of the formal, time-consuming and complex complaints procedure. In this regard it is defensible to demand that one may expect from the children that they try to solve conflicts without resorting to formal procedures (i.e. informally at the group level, which they tend to do⁶³⁸) and from staff members including unit leaders to solve conflicts themselves.⁶³⁹ One should think of the regular ways of communication between children and staff, the establishment of a youth council (art. 79 YCIA; see para. 4.10.4) and (formal) mediation (see below). In essence, the formal procedures provided by the YCIA should never replace the 'regular' (informal and pedagogical) ways to communicate with a child in situations of conflict. At the same time the YCIA deliberately attributes the right to file a complaint to the child (i.e. it is his *right* to file a complaint), meaning that despite all alternatives, he must be enabled to file a complaint, if he wishes to do so.⁶⁴⁰

Although a tension between the formal complaints procedures and the pedagogical climate is not illusory, it is a misunderstanding that these procedures generate their usage at the expense of less formal ways of communicating. It is a challenge to avoid their use, but even if a child exercises his right to complain, this does not divest the staff and administration of institutions of their duty to respond in a way that is pedagogically sensible. That is a great challenge, which requires specific skills and arguably also stamina, but which can undoubtedly contribute to improvement of quality of institutional life, while taking the rights of children seriously.⁶⁴¹

⁶³⁸ YCIA Evaluation 2004, p. 132.

⁶³⁹ This has been the point of departure of the Minister of Justice; Explanatory Memorandum YCIA, p. 67.

⁶⁴⁰ Appeals Committee, 28 February 2002, 01/2190/JA. Even if the child files a complaint without a direct interest he can be admitted; Appeals Committee, 19 August 2004, 04/0998/JA (in this case the institution found that the child did not have any lawful interest after an attempt to mediate).

⁶⁴¹ An exemplary case in this regard is Appeals Committee, 24 February 2003, 02/2093/JA, in which a child filed a complaint regarding a bag of crisps. Group leaders granted the child a bag of crisps as a treat, but the consumption date had expired. Apparently, the child found reason to complain formally (and the director to lodge an appeal). The Appeals Committee stated *inter alia* that the group staff could have avoided this escalation simply by providing another bag of crisps. This case was criticized by some (as it would prove that the complaints procedure was abused by children by filing complaints about 'irrelevant' issues), but, i.e. it was a matter of treatment of the child with respect for his dignity; cf Liefwaard 2004.

Furthermore, it is interesting to note that children tend to complain the most about placement in their room (as a measure of order and/or related to understaffing), the general way in which they are treated by staff and about food.⁶⁴²

Finally, the total number of appeals has increased to some extent during the first years of the millennium, but decreased afterwards. The number of appeals regarding placement or transfer increased significantly in 2005 compared with the years 2001-2004 (see table 4.8).

Table 4.8: Total Number of Appeals regarding Complaints, Placement or Transfer and Waiting Term in Remand Home (Art. 11 YCIA)

Year	2001	2002	2003	2004	2005	2006
Appeals in complaints procedure	7	52	84	29	28	32
Appeals placement or transfer	3	1	11	4	37	31
Appeals regarding waiting term	0	0	0	2	6	7

Source: Annual Reports The Council 2001-2006.

4.10.3.5 Right to Mediation

While the right to file complaints dates from 1984, the right to request mediation was introduced by the YCIA in 2001. The child has the right to make a (written or oral) request for mediation to the supervising official (art. 64 YCIA). The request for mediation must concern a grievance regarding an act of staff members or the director or regarding the way the staff members or the director have acted in light of their duty of care. Consequently, the right to request mediation has a broader scope than the right to file a complaint. It can affect basically everything, including the general treatment of the child or general rules that are excluded from being remedied through the right to complain. It can also include a request for mediation regarding decisions that can be remedied through the right to complain (under art. 65 YCIA).

⁶⁴² YCIA Evaluation 2004, p. 87-88; see also Paulus 2007, p. 36.

There is no legal term for making requests for mediation regarding other issues.⁶⁴³ The child's parent(s), guardian(s), step or foster parent(s) have an independent right to make a request for mediation regarding the way they have been treated by the institution's administration (art. 64 (8) YCIA). In addition, they can represent their child (art. 80 YCIA)

The supervising official on duty is entrusted with the role of mediator. He is attributed the task to mediate in order to find an acceptable solution for both parties within six weeks. This term is not rigid; the supervising official must 'strive' to find an acceptable solution within six weeks (art. 64 (3) YCIA). The supervising official hears both child and director, either together or separately, and reports his findings in writing.⁶⁴⁴ If the child is not capable of understanding or speaking the Dutch language the supervising official is under the obligation to provide an interpreter, which applies to the hearing and the concluding report.

The outcomes of the mediation are not binding. The director has four weeks to respond to an outcome and to inform the child and supervisory committee, whether he shares the views of the supervising official. He must also clarify if and if so which measures he intends to take.

The YCIA is unclear with regard to the procedures after this first attempt of mediation. One should distinguish two moments in the mediation procedure: first, the moment the supervising official presents his findings and second, the moment the director replies to the outcome.

At the first moment the child has the right to file a complaint under article 66 (6) YCIA within seven days. Although this is not mentioned explicitly, it seems systematically correct that the child can only use this option if the mediation affected a decision that can be remedied through the right to complain. This remedy seems to be relevant primarily for the situation in which the child is not satisfied by the outcome of the mediation procedure. Given the term of seven days the child probably cannot wait for the director's official response first, since the latter is given four weeks to respond. At the same time this term forces the director to hurry if he – nevertheless – wishes to offer *another* informal solution to the child. Furthermore, it may be that the findings of the supervising official in principle have the child's approval, but that his level of satisfaction still depends on the director's response. Thus, based on this legal system the child is forced to file a complaint within seven days, while he waits for the director's reaction, which may lead to a

⁶⁴³ Only if it concerns decisions against which the child can file a complaint (under art. 65 YCIA) the child must make a request within seven days (art. 64 (2) YCIA). It does not deprive the child of his right to file a complaint afterwards; the term for filing a complaint has been interrupted.

⁶⁴⁴ This report must include information on the right to file a complaint and the complaints procedure, if the mediation concerns a decision that can be remedied through the right to complain; art. 64 (5) YCIA. See below.

withdrawal of the complaint. A rather complex legal system and one can raise the question whether this fosters the use of the complaints procedure as a measure of last resort.

Regarding the second moment (i.e. the director's response within four weeks after the mediator reports his findings), article 64 (7) YCIA provides the child with an additional right to file a complaint before the complaints committee, namely a complaint against the director's response on the outcome of the mediation. Again the law is unclear. Instead of providing that article 65ff YCIA is equally applicable (i.e. the regular complaints procedure before the complaints committee), article 64 (7) stipulates that the mediation procedure applies. This raises the question what such a complaints procedure should look like. Does the legislator aim at another attempt at mediation, but which is then conducted by the complaints committee? Or should it be at a regular complaints procedure before the complaints committee, as the Explanatory Memorandum seems to suggest?⁶⁴⁵ The latter approach would imply that through this secondary complaints procedure the child can (indirectly, after mediation) lodge complaints against all kinds of issues, which would otherwise have been inadmissible.

Finally, it is important to reiterate that the complaints committee has the possibility to refer an admissible complaint to the supervising official for mediation (art. 68 (4) YCIA).⁶⁴⁶ The complaints procedure will then be suspended pending the outcome of the mediation procedure. Although the YCIA is silent on this, it seems logical that the complaints committee only refers to mediation if there has not been a previous attempt at mediation regarding the challenged decision before.

In conclusion, the right to mediation has been introduced to provide an informal way of settling disputes. It thus is primarily a right designed to offer a form of alternative dispute resolution inside the youth institution, besides the formal complaints procedure (*cf* para. 4.10.3.4). Despite this laudable goal, the conclusion must be drawn that the legislator adopted a procedure that can hardly be regarded as informal or low-profile. The procedure has been designed in a way that ruled out any flexibility. The only flexibility that can be found, in essence the long terms for responses, is inappropriate and certainly does not foster a speedy solution to conflicts. Furthermore, the procedure is rather complex and leaves a number of questions unanswered, in particular regarding the follow up procedures. This raises questions with regard to the effectiveness of the mediation procedure, particularly because the complexity arguably affects its usability for children. Based on the YCIA Evaluation one gets the impression that children are not really aware of the

⁶⁴⁵ Explanatory Memorandum YCIA, p. 67.

⁶⁴⁶ The Minister of Justice has recommended that the supervisory committee and the institution's administration provide arrangements in this regard; Explanatory Memorandum YCIA, p. 69-70.

mediation procedure; in general they have heard of mediation, but tend to confuse the procedure with the regular visits of supervising officials.⁶⁴⁷

It is furthermore not surprising that institutions and supervisory committees have adopted various ways of operating with mediation, based on different, and not always correct (i.e. lawful), interpretations.⁶⁴⁸ Mediation is not always interpreted as a *right* attributed to the child, but as a tool of settling disputes at the supervisory committee's and institution's disposal instead. This leads for example to the practice that if a child files a complaint, this automatically leads to mediation.⁶⁴⁹ Although, one could defend such approach, the YCIA represents a different one. Furthermore, the YCIA Evaluation showed that, although the mediation procedure is generally regarded of significance, both institutions and supervisory committees pointed at the increased workload caused by the complex, time-consuming and formalistic procedure. In particular, the supervisory committees suffer from the increase of administrative tasks, since their members perform their tasks on a voluntary basis and there is a lack of additional administrative support, similar to the support concerning the complaints procedure.⁶⁵⁰

Finally, the YCIA does not include any demands regarding the quality of either the mediation procedure or the mediator. Apparently, it is assumed that a supervising official is capable of performing this task.⁶⁵¹

In conclusion, the legal foundation of the mediation procedure should be subject to review and at a minimum be clarified and simplified. One could consider allowing the right to file a complaint after the first attempt at mediation, but only if the child has requested mediation regarding a decision that can be remedied through the right to complain.

In addition, it is important to note that there is no disaggregated data on the use of the mediation procedure, the outcomes and the relation between the mediation procedure and the complaints procedure. Consequently, it is not possible to determine the effects of the introduction of the mediation procedure. The figures presented above (tables 4.6 and 4.7) make clear that a lot of complaints are eventually withdrawn. This may indicate that mediation is used and results in an increase of withdrawals (also in light of the practice of compulsory mediation as described above and because children tend to complain a lot about food and general treatment, which, i.e. cannot be remedied through filing complaints). However, it

⁶⁴⁷ YCIA Evaluation 2004, p. 132.

⁶⁴⁸ *Ibid.*, p. 169.

⁶⁴⁹ See, e.g. Volf 2003.

⁶⁵⁰ YCIA Evaluation 2004, p. 169-170. The Council pointed out similar issues regarding mediation; Annual Report The Council 2005, p. 20.

⁶⁵¹ The same is true regarding the committee's other tasks. Membership in general has not been surrounded by safeguards, such as knowledge of the law and regulations, experience in the specific field, etc.

may very well not be like that; one cannot draw any conclusion in this regard. Therefore, it is strongly recommendable to improve the registration in this regard and distinguish figures regarding mediation. In addition, one should conduct further research on the use of the mediation procedures, including the assumed different operational methods in practice.

4.10.4 Some Special Procedures and Issues

4.10.4.1 Right to File Objections (and to Appeal)

The YCIA furthermore provides a number of other special procedures which will be highlighted briefly. The first affects decisions of the selection official (see para. 4.7). Article 18 YCIA provides that a child can submit objections against the selection official's decisions regarding placement,⁶⁵² termination of participation in an STP (see para. 4.11) or the use of force or restraint (e.g. during transportation). A child committed to a remand home on the basis of a treatment order can file objections against the prolongation of the term for placement in a treatment centre (art. 11 YCIA; see also para 4.7).

These decisions do not fall under the scope of the 'regular' complaints procedure. Instead, the child can submit a reasoned notice of objections to the selection official. The procedural rules are more or less similar to those regarding the complaints procedure, which *inter alia* implies that a child who does not speak or understand the Dutch language can make objections in his own language and is entitled to receive a translation of the decision. Furthermore, the selection official must decide on the objections within six weeks and must inform the child in writing. The decision must be reasoned and inform the child on his right to appeal against the decision.⁶⁵³

The child has the right to appeal against the selection official's decision on the objections before the Appeals Committee (of the Council). Although article 77 YCIA only provides for appeals against decisions of (partly) unfounded objections or the declining of a request (see further below), the Appeals Committee has argued that the legislator also meant to provide the right to appeal against the selection official's decision that the child's objections are inadmissible.⁶⁵⁴

⁶⁵² Including specific placement in a department of intensive care or treatment; arts. 22a and 22b YCIA.

⁶⁵³ This must be done in a language that he understands. Again this implies that a child who does not speak or understand the Dutch language must be provided with a translation or with the assistance of an interpreter. If the child had been enabled to make his objections known to the selection official earlier, he cannot file objections (art. 18 (5) YCIA), but he can appeal the decision immediately.

⁶⁵⁴ Appeals Committee, 21 July 2004, 04/0707/JB.

The child must lodge the reasoned notice of appeal within seven days. During the procedure the child can submit a request for suspension of the decision to the chair of the Appeals Committee. The appeal procedure is similar to the complaints procedure. The Appeals Committee can rule the appeal inadmissible or if admissible, (partly) founded or unfounded. If the appeal is ruled founded, the Appeals Committee can repeal the initial decision (i.e. not the decision on the objections) and order the selection official to make a new decision or make a new decision itself. The Appeals Committee can also merely repeal the decision. If the legal effects cannot be reversed compensation can be granted.⁶⁵⁵

The right to file objections and to (subsequently) appeal is of great significance for the child to influence the formal proceedings regarding placement and transfer, in particular because as mentioned in paragraph 4.7 the selection official has much discretion regarding placement and transfer. The same is true regarding decisions concerning STPs (see para. 4.11).

4.10.4.2 Right to Submit Requests

Another procedure that should be mentioned is the right of the child to submit a formal and reasoned request to the selection official for placement, transfer or participation in an STP (art. 19 YCIA), which relevance has been highlighted just above. There is no term for the decision upon such request. If the selection official declines the request, the child can submit another after two months. However, he can also lodge an appeal to the Appeals Committee. There is no obligation to file objections first. The same is true if the child has agreed on the director's advice regarding placement (art. 19 (2) YCIA).

The YCIA does not provide any other formal way of submitting requests or to direct the institution's administration, although children should under certain rights by implication have such means at their disposal. One could think for example of the right to access their personal file. This implies that the child has the right to formally request access (art. 68 (1) YCIR). However, the child does not seem to have the right to request leave or an interim evaluation of his residential or treatment plan (see para. 4.11). A procedural legal status is recommendable also in light of the JDLs, calling for a formal entitlement to communicate with the institution's administration (rule 75 JDLs), although it should never ban informal ways of communicating.

4.10.4.3 Right to Appeal (Withdrawal of) Authorization by the Minister of Justice

Another special procedure is the right to appeal against the Minister of Justice's refusal to grant authorization for leave or a reintegration programme (i.e. release on

⁶⁵⁵ See, e.g. Appeals Committee, 25 November 2004, 04/1959/JB.

licence) or against the withdrawal of authorization (art. 77 (2) YCIA; see paras. 4.8 and 4.11). The YCIA neither provides for rules regarding the term for lodging the appeal, nor regarding the term for making a decision on the appeal.⁶⁵⁶

4.10.4.4 Medical Appeal

The final special procedure embodied in the YCIA is the procedure regarding medical appeal. Article 47 (5) YCIA provides that the child can appeal against medical treatment by the institution's doctor. The procedure has, however, been worked out in the YCIR (art. 55ff YCIR). The appeal can be lodged before a special Appeals Committee of the Council for the Administration of Criminal Justice and Youth Protection, in which one lawyer and two doctors must reside. However, before the child can lodge this appeal he must make a written request for mediation first to the Medical Advisor of the Ministry of Justice.⁶⁵⁷

4.10.4.5 Other (Inter)National Remedies

Despite the fact that the YCIA and to some extent the YCIR provide an extensive set of complaints procedures, possibilities to appeal or to submit requests, there are other 'external' remedies available, for example in the Civil Code or in International Human Rights Treaties.⁶⁵⁸ Regarding the former, one could think of actions arising from unlawful acts of the institution's administration, the director or individual staff members or even of the Ministry of Justice (art. 6:162 Civil Code), either through interlocutory or regular proceedings. A child can also lodge an appeal before the ECtHR or file an individual communication against the Dutch government with the HRC under the ICCPR, after the child has resorted to all (effective) national remedies (see Chapter 2). However, these procedures will take a long time and will therefore primarily be of added value regarding fundamental issues or gross human rights violations and subsequent damages suffered. Finally, the National Ombudsman has the authority to conduct research regarding complaints on issues in or around youth institutions.⁶⁵⁹

4.10.4.6 Youth Council and Children's Participation

As mentioned above (informal) communication between the institution's administration is of significance for the pedagogical climate in the institution and

⁶⁵⁶ Cf Appeals Committee, 22 May 2002, 01/2262/JV.

⁶⁵⁷ In addition, each medical officer has a professional code and is subject to disciplinary proceedings before a medical disciplinary tribunal.

⁶⁵⁸ Cf Kelk 2003, p. 91ff.

⁶⁵⁹ An example is the National Ombudsman's report in 2004 regarding children placed in youth institutions in situations of crisis (child protection); National Ombudsman 2004.

for the implementation of rights of the children under the institution's regime. Article 79 YCIA provides that the director has the duty of care to arrange regular meetings between him and the children. During these meetings children and director can raise issues that affect the children's stay in the institution and institutional life. Most of the youth institutions have a participation body for children or a youth council that for example has dinner with the director once a month.⁶⁶⁰ Sometimes a child can enter the council as part of the rewarding scheme. Such a youth council can be used as a forum to discuss issues and general rules that are subject to debate between children or between children and the institution's administration. It can also contribute to the prevention of conflicts regarding general treatment and general aspects of institutional life.

This provision for a form of participation and all the provisions regarding the remedies addressed earlier in this paragraph, identifies in essence the protection of the rights of the child by acknowledging his right and ability to participate (art. 12 CRC). The YCIA furthermore acknowledges that each child in a youth institution is (legally) capable of exercising these rights.⁶⁶¹

This does, however, not release the institution from the duty to assist the child in exercising his procedural rights if necessary due to, for example, immaturity or illiteracy, or simply because the law needs clarification. The absence of the entitlement to receive (constant) legal and other appropriate assistance is a significant omission, although it is arguable that article 37 (d) CRC is directly applicable in this regard (see further rule 78 JDLs).

In this regard it is finally important to reiterate that it is vital that each child is provided with adequate and objective information on his procedural legal status. Child legal aid centres, a specialized ombudsperson or the supervisory committee can play an important role in this regard, in particular when one takes into account the fact that children in youth institutions tend to seek assistance and information with their group leaders, which despite all best intentions cannot be regarded as an objective source (see also earlier in para. 4.7).

4.10.5 Conclusion

By embodying these provisions comprehensively in the YCIA (and YCIR) the Dutch legislator has explicitly acknowledged the significance of the presence of legal remedies and inspection and supervisory mechanisms for the protection of the rights of children deprived of their liberty in youth institutions. Moreover, the legislator has by doing so to a large extent met International Human Rights

⁶⁶⁰ See, e.g. Annual Report The Council 2005, p. 20 (*cf* Annual Report The Council 2004, p. 16 and Annual Report The Council 2003, p. 25).

⁶⁶¹ Although one could wonder whether the legislator has sufficiently taken into account the fact that due to the absence of a minimum age for deprivation of liberty, children can be rather young.

Standards; it has even provided an interesting example of how to implement these standards (see further Chapter 5). Nevertheless, there are some serious practical and legislative issues which deserve specific attention, future research and legislative change.

Despite the presence of a comprehensive set of legal procedures for the child, one should constantly strive to prove that it is superfluous. The instruments and remedies are primarily meant to offer protection in the event that a child's rights and interests are at stake. Obviously, the fostering of a healthy, pedagogical climate in a youth institution should be of primary concern, in order to guarantee each child the treatment he is entitled to. If one does his utmost to realize this, one need not fear for the consequences of the child exercising his rights to remedy decisions or overall treatment. On the contrary, it can then be used to improve the institution's policies, work and transparency where necessary.

4.11 REALIZATION OF OBJECTIVES OF DEPRIVATION OF LIBERTY

4.11.1 Introduction

As pointed out in paragraph 3.12, the objectives of deprivation of liberty of children in the juvenile justice context are embodied in article 40 (1) CRC and must aim at teaching the child how to respect human rights and fundamental freedoms of others. In addition, the deprivation of liberty should from its start aim at the child's reintegration and contribute to the child's preparation for his assumed constructive role in society. This calls for an (overall) treatment of the child in a manner that is consistent with his sense of dignity and worth and should include education and vocational training designed to prepare the child for his return to society and contact with the wider community. Furthermore, reintegration programmes should be part of the (educational) programme as well. In order to improve the chances of success, it is important that the programme starts during the deprivation of liberty and continues afterwards, through means of aftercare. In this regard participation of the professionals in and around the institution and community is of particular significance.

The YCIA represents an approach that recognizes to a large extent the above mentioned key principles of International Human Rights Law and Standards and embodies, in particular in light of the specific responsibility of the youth institutions and all other key players involved in deprivation of liberty of children within the juvenile justice system, a number of relevant elements. Most elements were addressed in paragraph 4.8 regarding the quality of treatment and the daily programme in institutional life: education, contact with the family and the outside world and leave arrangements. The YCIA fosters in this regard a community-based approach by Dutch youth institutions. Two other elements of significance are the explicit setting of objectives of deprivation of liberty (art. 2 (2) YCIA) and the

residential or treatment plan. Furthermore, the YCIA explicitly (and newly) provides a reintegration programme, namely STP (art. 3 YCIA).⁶⁶² This paragraph will address these elements successively, followed by some remarks regarding aftercare and research regarding the success rate of placement (and treatment) of children in youth institutions.

4.11.2 Fostering Objectives of Deprivation of Liberty in the Context of Juvenile Justice

4.11.2.1 Objectives of Deprivation of Liberty in Dutch Youth Institutions

As mentioned briefly in paragraph 4.5, the Dutch legislator has laid down the central objectives of the enforcement of deprivation of liberty in youth institutions in article 2(2) YCIA, which states: ‘With the maintenance of the character of the sanction or measure, its execution shall be used for the upbringing of the juvenile and shall as much as possible be made conducive to the preparation of his reintegration in society. If the measure of deprivation of liberty includes individual treatment, its execution shall take this into account this as well.’

Consequently there are three main objectives: security, upbringing and reintegration. If the deprivation of liberty is also meant for individual treatment (e.g. under a treatment order), this treatment will be an additional objective. The objectives of the child’s institutional stay apply equally to all children regardless of the reason for their placement and apply equally to all institutions regardless of their designated use.⁶⁶³

The formulation of article 2 YCIA implies that the objective of security (of both society and the child) is the point of departure, inherent to the (need for) deprivation of liberty. However, the placement must be used for the upbringing of the child. This is a particular and distinctive characteristic of the stay in a youth institution. The laws governing prisons and treatment centres for adults have not set a similar objective. Upbringing must be seen as the central objective and as a direct instruction to all working in a youth institution.⁶⁶⁴

Furthermore, the institutional stay must be instrumental for the child’s reintegration into society (art. 40 (1) CRC). By formulating article 2 YCIA in this way, reintegration has a less prominent position than upbringing. Although they are directly connected, one should always work on the child’s (continuity of) upbringing, while the actual reintegration of the child plays a role later during the deprivation of liberty, at least not necessarily from the beginning. In addition, reintegration is not solely the responsibility of the institution. It is the institution’s

⁶⁶² Another similar programme is release on licence (‘proefverlof’).

⁶⁶³ Obviously, individual treatment will only be an objective in treatment centres.

⁶⁶⁴ Explanatory Memorandum YCIA, p. 16. It also fits the pedagogical approach of the juvenile justice system (art. 40 (1) CRC).

responsibility to a large extent, but also of other authorities, such as the probation service (see below). According to the Minister of Justice institutions have the responsibility to perform the task as the child's carers, during his stay, which should be used for the child's eventual reintegration: upbringing as an investment in the child's future.⁶⁶⁵

The paramount position of upbringing as the objective, in conjunction with reintegration, implies that the objective of security may never hamper the realization of the first two objectives, for example based on punitive arguments.⁶⁶⁶ Although security may be required for the best interests of child and society, it should never block an (increasingly used) community-based approach *per se*, including an education or reintegration programme within the community.

Thus, youth institutions should distinguish themselves from adult facilities regarding the aspects just mentioned. In addition, the YCIA should foster the realization of the objectives. The minimum conditions of the deprivation of liberty should serve the upbringing and reintegration of the child; this is why the YCIA includes rules regarding the principle that children should stay in groups, receive education, and have contact with the wider community and leave. In addition, these objectives are certainly not served by denial or violation of children's rights and freedoms. Obviously, the content of the daily and educational programme is of particular significance, which requires a specific, individualized approach.

4.11.2.2 Individual Programme – Residential or Treatment Plan

Youth institutions are to a large extent free to determine the content of their approach. The YCIA aims at a tailor-made approach through the use of residential or treatment plans, for remand homes and treatment centres respectively (art. 20ff YCIA; art. 25ff YCIR).⁶⁶⁷ A residential or treatment plan can be regarded as the central document embodying the plan of action, working methods and objectives of the placement regarding each child individually. The plans are drawn up under the responsibility of the director and at least a group leader, teacher and behavioural expert must be involved. The child must be consulted and his parents must be involved as much as possible (again a form of participation (see para. 4.10); art. 12

⁶⁶⁵ Explanatory Memorandum YCIA, p. 16 with explicit reference to art. 19 CRC.

⁶⁶⁶ This would not fit the requirement of the shortest appropriate period of time either (art. 37 (b) CRC; see para. 3.4).

⁶⁶⁷ This has not been introduced by the YCIA. Youth institutions, particularly treatment centres have used a plan-based approach for a long time; *cf* Weijers & Liefwaard 2007. The YCIA has introduced a residential plan for remand homes; Explanatory Memorandum YCIA, p. 38-39; De Groot 1999, p. 101.

CRC).⁶⁶⁸ Regarding a child deprived of liberty under the juvenile justice system, the (youth) probation service and Child Care and Protection Board must be involved as well, which is of particular significance for the child's reintegration.⁶⁶⁹

The YCIA embodies an obligation for treatment centres to draw up a treatment programme for each child individually within a period of six weeks (after admission to the institution). A similar obligation applies for remand homes regarding residential plans for children who have to serve a sentence of three months or more, less pre-trial detention. There is no obligation regarding pre-trial detainees or children with a short sentence.⁶⁷⁰

The YCIR provides details regarding the content of a residential or treatment plan (arts. 26 and 27 YCIR). *Inter alia* a residential plan must include a description of the child's problems, history of care and assistance so far, relevant medical data, group where the child will stay, allowed freedom of movement (in and outside the institution),⁶⁷¹ participation in daily, group activities, contact with individuals outside, compulsory educational programme and other ways of pedagogical development. Leave arrangements or participation in a reintegration programme should be included as well. The treatment plan must embody similar elements, but there are some additional requirements, such as a diagnosis of the child's problems, medical data relevant to the treatment programme, details on the realization of the treatment objectives and time path.⁶⁷²

Thus, the residential or treatment plan is the determining document for the realization of the objectives for the child's stay in a youth institution. Given the inherent dominance of the plan, it is of great significance that it is subject to periodic review (*cf* art. 25 CRC). This has been formulated as a right of the child to evaluation at least four times a year (art. 28 YCIR).⁶⁷³ Although it forces institutions

⁶⁶⁸ Unless they do not want to participate or their participation is undesirable in the child's interests, e.g. if the child has been sexually abused by (one of) his parents; Explanatory Memorandum YCIR, p. 50-51. According to the Council children's participation is *de facto* not always safeguarded; Annual Report The Council 2005, p. 21.

⁶⁶⁹ The establishment of plans and evaluations often form part of residential or treatment meetings where besides the child, a mentor, behavioural expert, teacher and if appropriate the child's parents are present; YCIA Evaluation 2004, p. 109.

⁶⁷⁰ There is no obligation to draw up a plan regarding all other children placed in remand homes (e.g. 'child protection children'), including those waiting for an appropriate place in a treatment centre. *Cf* the critical remarks of the Netherlands Court of Audit in this regard (see also para. 4.1); Netherlands Court of Audit 2007.

⁶⁷¹ Although this is not mentioned explicitly, within boundaries provided by the YCIA (see para. 4.8).

⁶⁷² If the child is about to leave the institution, the plan forms the basis of an 'exit conversation', meant to check the realization of the objectives. The institution should make a report of this conversation, which will probably be filed in the child's personal file (art. 30 YCIR).

⁶⁷³ Although it would have been better to adopt this right in the YCIA, rather than in the lower YCIR.

to conduct evaluations at least four times a year,⁶⁷⁴ the child has no explicit right to request an evaluation (see also para. 4.10). He has the right to be heard during the evaluation. If the plan is adjusted, the child must be consulted, like regarding the initial establishment. Consultation, however, is no hard guarantee that his views are taken seriously (art. 12 CRC), although the establishment or adjustment of (parts of the) plan can (arguably) be subject to complaint.

According to the YCIA Evaluation the compulsory term for drawing up a treatment plan (i.e. six weeks) can be problematic in practice, although most institutions seem to be able to meet the requirement.⁶⁷⁵ In addition, the Evaluation shows that a residential plan, which is only partly compulsory, is often omitted. Given the significance of a plan-based approach from day one, even if a child only stays briefly, it is highly recommendable to provide a regulation to force remand homes to draw up a (concept) residential plan.⁶⁷⁶ Although one should arguably loosen the demands of such initial plan, it would fit the need for a tailor-made approach from day one, particularly regarding education, the determination of the appropriate group the child is placed in and contact with the wider community.⁶⁷⁷

4.11.3 School and Training Programme – a Reintegration Programme

4.11.3.1 STP – ‘A Favour, Not a Right’

The YCIA introduced the STP, a reintegration programme, as an additional form of enforcement of deprivation of liberty. It is neither an alternative form of placement, nor does it suspend the deprivation of liberty; it rather is a subsequent form of enforcement of deprivation of liberty, after an initial stay in the institution (art. 3 YCIA).

The STP has been defined as a system of activities in which the child participates in order to prepare for his reintegration. The activities can include educational programmes, vocational training or internships and are meant to teach social skills, educate, prepare the child for work and teach him how to use his leisure time. The STP can also be used to address specific needs of specific groups

⁶⁷⁴ In addition, the plan can always be adjusted earlier if there is reason to do so, e.g. after an incident (art. 29 YCIR); see, e.g. Appeals Committee, 10 May 2004, 04/0308/JA. One should always conduct an evaluation in time before the institution has to advise the court regarding prolongation of the treatment order.

⁶⁷⁵ This still is problematic; see Annual Report The Council 2005, p. 21.

⁶⁷⁶ In addition, the term should be shorter than six weeks, given the shorter average stay (see para. 4.1).

⁶⁷⁷ Obviously, this is best served with the full cooperation (and support) of other partners such as the Child Care and Protection Board, Youth Care Agency (youth probation) and, e.g. the Public Prosecutions Office. Previous care and assistance reports could, e.g. be used for the drawing up of the initial (concept) residential plan soon after the child's arrival; YCIA Evaluation 2004, p. 194.

of children, such as mentally disabled children, children with psychiatric disorders or children who were (or still are) addicted to drugs (art. 2 (2) YCIR). The child participates in the programme for at least 26 hours a week, which takes place outside the institution, implying that the child stays no longer residing in the institution (art. 2 YCIR).

The STP's primary objective is the child's reintegration, but according to the Minister of Justice it can have a penal element as well. This is visible for instance in the supervision, the number of hours a child has to participate and the risk of the child being placed back in the institution if he violates conditions. Thus, the programme is not without obligations.⁶⁷⁸

The STP is in principle meant for all children under the juvenile justice system.⁶⁷⁹ However, the specific group of children under a treatment order, who suffered from limited development or mental disorder at the time they committed the offence ('the most heavily disturbed children, whose treatment order could be prolonged up to 6 years') is excluded from participation in an STP but can apply for release on licence ('proefverlof').⁶⁸⁰

Since reintegration is a key objective of the juvenile justice system (art 40 (1) CRC), one could consider participation in an STP a right of the child, but it is not. It has been designed as a favour that can be granted to the child. According to the Minister of Justice, society may demand that a child should not be granted an STP or that a shorter period only be granted.⁶⁸¹ In addition, the Minister has provided criteria for granting participation.⁶⁸² Although this position could be understood in light of the general objectives of the justice system (retribution, protection of society; general

⁶⁷⁸ *Parliamentary Documents II* 1998/99, 26 016, no. 6, p. 8.

⁶⁷⁹ This can include children in pre-trial detention (art. 3 YCIR), which has met objections; see State Secretary of Justice, Letter to parliament on 13 May 2002, no. 5163152/02/DSRS. *Cf* *Parliamentary Documents II* 2005/06, 30 332, no. 3, p. 2 in which the Minister of Justice proposes to drop this option. The YCIR has not been adjusted yet, but given the recent legislative change of juvenile criminal law (1 February 2008) that increased the opportunities to suspend pre-trial detention under conditions, STP has lost its added value. 'Child protection children' could participate in an STP as well (art. 6 YCIA); child refugees who have to leave the country, are to be expelled or to be extradited, are excluded from participation in an STP (art. 7 YCIR).

⁶⁸⁰ Art. 5 (2) YCIA jo. art. 77s (3) CrimCo; Explanatory Memorandum YCIR, p. 38. The differences between STP and release on licence are rather unclear and *de facto* there is no substantial difference. One should reconsider this distinction; YCIA Evaluation 2004, p. 195. Consequently this paragraph will only focus on the STP. Most of the information provided applies equally to release on licence. The main difference between an STP and release on licence is that the decision regarding the latter is made by the director with an explicit authorization of the Minister of Justice, while the decision to institute an STP is made by the selection official after an application of the director (art. 31 YCIA resp. art. 9 YCIR).

⁶⁸¹ Explanatory Memorandum YCIR, p. 41.

⁶⁸² *Ibid.*, p. 33.

prevention), it is harder to defend this position regarding juvenile justice, where special prevention should be of particular consideration (which in the long term serves the benefits of society as well). In light of this, even though the STP is not regarded as a right, the child has the right to be fully assisted in its reintegration. Consequently, the conditions for participation should be used in a non-rigid and non-discriminatory manner.⁶⁸³

4.11.3.2 Procedures and Conditions

The main rules regarding the procedures and conditions of the STP can be found in article 2ff YCIR.⁶⁸⁴ A child sentenced to youth imprisonment can participate in an STP, after serving at least half of his total sentence and if his remaining sentence is a minimum of one month and a maximum of three months. In addition, children sentenced to youth imprisonment, who still have to serve another sentence or who are sentenced to a hospital order as well cannot participate (yet) in an STP (art. 4 YCIR).

A child committed on the basis of a treatment order for two years can start an STP within three months before the end of the order. If the order has been prolonged to two years the STP can start within six months before the end of the order. The YCIR leaves room for longer periods in special cases. One should think of the situation in which a child has already started an STP, but the court nevertheless prolongs his treatment order. One of the reasons for prolongation in this regard can be to provide custodial backup (art. 5 (1) YCIR).⁶⁸⁵

Within these legal boundaries, the initiative for participation in an STP will be taken by the institution's director, if he finds it sound to do so. He can apply for participation after consultation with the child, in cooperation with the (youth) probation service of the district in which the child will participate in the STP, and before the selection official makes his decision (art. 8 YCIR).⁶⁸⁶ The child's parents, guardian(s), step or foster parents must be involved as much as possible (art. 8 (3) and (6) YCIR). As mentioned in paragraph 4.10 the child is entitled to submit a request for an STP directly to the selection official (art. 19 YCIA). The decision to let the child participate is exclusively directed to the selection official (art. 9 YCIR). Consequently, the institution must provide the selection official with sufficient

⁶⁸³ The child's right to remedy decisions in this regard is of significance (see para. 4.10).

⁶⁸⁴ The National Agency for Correctional Institutions has developed a procedure for the application of the STP/Release on licence; National Agency for Correctional Institutions, *Aanvraagprocedure STP/Proefverlof*, The Hague: October 2001.

⁶⁸⁵ Explanatory Memorandum YCIR, p. 37-38. If the child has been waiting in a remand home for a long time (see para. 4.3), this may negatively affect his chances to start an STP during the (initial) period of the treatment order.

⁶⁸⁶ The Child Care and Protection Board must be enabled to provide advice regarding children in youth imprisonment or under a treatment order. Under certain conditions the Public Prosecutions Office must be involved as well; art. 8 (3) jo. 1 (b) YCIR.

information, which *inter alia* includes the child's behaviour, motivation and capabilities to take his responsibility and to deal with the freedoms related to the STP (i.e. a stay no longer in a custodial setting). Two general conditions for participation in an STP are that the child must have a permanent residence and that the 'STP programme' is suitable for the child. Particularly regarding children under the juvenile justice system, the selection official must take into account the nature, severity and background of the offence, the course (and progress) of the deprivation of liberty and the risk of recidivism (art. 9 (2) YCIR). The child must agree in writing to his participation and to the applicable conditions (art. 9 (3) YCIR). If the child is entitled to start he must receive a written statement which describes the activities that the child is going to participate in, the conditions and the grounds for termination of the programme (art. 9 (6) YCIR).⁶⁸⁷

4.11.3.3 Programmes and Enforcement

Each STP must be recognized by the Ministry of Justice, which implies that the Minister of Justice is responsible for the STP as a programme.⁶⁸⁸ However, the director carries the responsibility of enforcement of the programme and the child's participation. The (youth) probation service is responsible for the actual supervision and can make small adjustments to the programme, which must be reported to the director.⁶⁸⁹ The participation of (youth) probation service is important in light of the 'transfer' to aftercare when the deprivation of liberty, and thus the STP, have ended. During the STP the child must obey the instructions of the (youth) probation service and provide it with the required information. In addition, he must not violate the general conditions (i.e. no criminal offences) or any of the special conditions ordered by the director (e.g. electronic monitoring; art. 12 YCIR). If the child violates one of the conditions the (youth) probation service should inform the director immediately. The latter can decide to warn the child, to change or add special conditions; he can also advise the selection official to terminate the STP.⁶⁹⁰

⁶⁸⁷ The centralization in this regard has been heavily criticized by children's judges and the expert panel of the YCIA Evaluation; YCIA Evaluation 2004, p. 194. *Cf* Bartels who argues that the systematic centralization of competences to make decisions is based on a lack of trust in the people and authorities working directly with the children in institutions; this is particularly true for decisions regarding reintegration programmes and leave arrangements. In addition, Bartels criticizes the use of general (i.e. not individualized) check lists which deprives the individual civil servants and authorities from diverting from general criteria if appropriate in an individual situation; Bartels 2003, p. 168-169.

⁶⁸⁸ Explanatory Memorandum YCIA, p. 19. *Cf* Ministerial Regulation Recognition School and Training Programme). *De facto*, all institutions work with 'Work-wise', a employment support programme for children, which starts in the institutions and continues afterwards; see www.work-wise.nl, last visited 1 June 2008. It is not limited to children in an STP.

⁶⁸⁹ The (youth) probation services must also report periodically to the director; art. 10 YCIR.

⁶⁹⁰ He must inform the child in writing about these decisions; the child can file complaints against the decisions of the director (arts. 12 (6) and 13 YCIR).

Termination of the STP implies that the child should be transferred back into the institution. This explains why the selection official has the discretion so to order. It seems recommendable to transfer the child back to the institution where he stayed before he started the STP. *De facto*, this could be problematic.⁶⁹¹ In light of efficient division of capacity (in particular regarding treatment centres), the place may very well be ‘taken’ by another child. This may cease the intentional effect of the STP, with the institutional placement as backup for the child’s participation in an STP. These practical problems point at another objective of the introduction of the STP; it has not only been designed to provide adequate reintegration programme for children, but also to use a youth institution’s capacity efficiently and reduce costs of the execution of deprivation of liberty.⁶⁹²

4.11.3.4 STP, a Resounding Success?

The YCIA Evaluation has indicated that the STP could not be considered a success in its first years. The number of STPs completed in 2002 was 47. Thirteen STPs were terminated before completion.⁶⁹³ The 2003 annual report of the National Agency for Correctional Institutions reveals that in that year 91 children participated in an STP or release on licence.⁶⁹⁴ However, it is unclear whether these STPs were completed or are still running. In the years 2004, 2005 and 2006 the numbers of STPs increased to 187, 152 and 200 participants respectively.⁶⁹⁵ Although, the use of STPs has slowly been increasing in the past four years, it is fair to conclude that, despite good initiatives in light of children’s reintegration, one of which is the introduction of the STP, the enforcement falls short of expectations. The YCIA Evaluation pointed at possible and probable causes such as the lack of adequate programmes, lack of sufficient financial resources and insufficient cooperation between the different partners involved, namely institutions, (youth) probation, Child Care and Protection Board and Ministry of Justice.⁶⁹⁶

The findings of the YCIA Evaluation were confirmed to a large extent by the Youth Care Inspectorate in its 2006 report on the STP in practice and its effects, in

⁶⁹¹ Cf e.g. Doek & Vlaardingerbroek 2006, p. 726.

⁶⁹² See, e.g. DJI Annual Report 2004, p. 12 in which the National Agency for Correctional Institutions argues that the increase of STPs compared to 2003 has led to an increase of ‘the chances of successful reintegration’ but ‘also [to a reduction of] the capacity pressures’.

⁶⁹³ YCIA Evaluation 2004, p. 81-82.

⁶⁹⁴ DJI Annual Report 2003, p. 41. The Service does not distinguish between public figures regarding STP and release on licence; cf YCIA Evaluation 2004, p. 81.

⁶⁹⁵ DJI Annual Report 2004, p. 12, DJI External Annual Report 2005, p. 39 and DJI Annual Report 2006, p. 50.

⁶⁹⁶ YCIA Evaluation 2004, p. 192. The YCIA Evaluation also pointed out the lack of data and knowledge regarding the effect of the STP as a reintegration programme on the actual success of the child’s reintegration; YCIA Evaluation 2004, p. 195.

particular regarding children within the juvenile justice system.⁶⁹⁷ The Inspectorate concluded *inter alia* that the STPs have good results for children at the individual level. However, in general the conclusion is justified that too few children participate in STPs and that the results of the STP as a reintegration programme to promote the child's reintegration is insufficient. According to the Inspectorate, this is caused by the fact that youth institutions and their partners in the chain of juvenile justice and reintegration (hereinafter: chain partners) are still implementing STPs due to practical problems. The most important practical problem is the relatively short period of time children have to serve after their sentencing to youth imprisonment. There are also problems, practically and financially, regarding places in schools or applications of benefits. Another problem is that children are often placed outside their region of residence, which may hamper the start of an STP. The chain partners involved do not use the option to transfer the child into his region before starting the STP; in addition, there are not enough remand homes or treatment centres in each region.

Besides these practical complications, the Inspectorate also pointed out the way youth institutions and chain partners operate as a factor that hampers the realization of (effective) STPs. The Inspectorate stressed that the realization of STPs is a joint responsibility of youth institutions and the relevant chain partners, in particular the (youth) probation service and the Child Care and Protection Board. The last one has proven to give too little content to its responsibilities and tasks, such as supervising and monitoring the child as to the direction of the process, and that this has been accepted by the other partners. In addition, the Inspectorate concluded that the partners are not acting professionally enough.⁶⁹⁸

The Youth Care Inspectorate made a number of recommendations.⁶⁹⁹ Some are directed towards the Minister of Justice in particular regarding the direction of the responsibilities regarding supervision during the enforcement, the position of the youth probation and regular probation services, the central role of the Child Care and Protection Board and the cooperation with other Ministries such the Ministry of Education and the Ministry of Social Affairs. For example, the Minister of Justice must hold institutions and chain partners responsible for the fulfilment and enforcement of their legal tasks and responsibilities. The National Agency for Correctional Institutions must provide a better regional approach, including transfers in order to prepare the child's participation in STPs within the region of his residence, a better indication (based in data and figures) on the realization of STPs and research regarding the long-term effects of the STP on children's reintegration.

⁶⁹⁷ Youth Care Inspectorate 2006.

⁶⁹⁸ In general, the Inspectorate was satisfied about the professionalism of youth institutions regarding STPs. The STP often is part of the residential or treatment plan, as part of a gradual transfer into society, often preceded by a placement in a (semi-)open institution.

⁶⁹⁹ Youth Care Inspectorate 2006, p. 31-32.

The Youth Care Inspectorate particularly addressed the position of children with a short remaining sentence, who cannot (yet) participate in an STP and whose participation within the current legal framework is problematic. In this regard, the Minister of Justice should conduct research on legal measures to enable the imposition of an STP as a special condition after youth imprisonment. One could think of a form of conditional release or a compulsory trial period under the special condition that the child participates in the STP.

Finally, both institutions and chain partners responsible for the enforcement of STPs should make STPs part of the reintegration programme that the child will go through, a programme that starts inside the institution and continues afterwards. The chosen programme must be made clear from the start and adjusted if required.⁷⁰⁰ This ‘programme approach’ also has implications for the position and role of aftercare programmes.

4.11.3.5 Aftercare

The STP is meant to provide tools to gradually reintegrate children from the institution into society. Although little is known about the outcomes and effects of the STP as a reintegration programme, its effect obviously is dependent on its enforcement (among others). As the Youth Care Inspectorate has pointed out, it is important that the STP is part of a programme that covers both the institutional stay and an aftercare programme after the termination of the measure or sentence leading to the deprivation of liberty. An aftercare programme is regarded important in order to avoid the child from falling back into old patterns. The STP and aftercare are (and should be) strongly related.⁷⁰¹

The YCIA Evaluation revealed that all parties involved find aftercare very important, but that a lot can and should be done to improve the realization of a proper system of aftercare.⁷⁰² The Minister of Justice seems to have become aware of the significance of aftercare for the success of the child’s reintegration. In

⁷⁰⁰ In light of this, one should keep in mind that one starts in time with the preparation for transfer to the region of the child’s residence and the making of concrete arrangements regarding the partner’s tasks and responsibilities. In addition, one should evaluate the STPs structurally in order to get a better view of effects, significant factors for the required effects and practical problems. Cf e.g. Volf 2005a.

⁷⁰¹ The Minister of Justice has stressed that it certainly is not excluded that an STP will be continued voluntarily after the legal ground for deprivation of liberty no longer exists; *Parliamentary Documents II* 1998/99, 26 016, no. 6, p. 10. However, he also stressed that this must be done through an aftercare programme (i.e. financed from another budget, because the budget for the enforcement of deprivation of liberty is no longer available).

⁷⁰² *Inter alia*, one should pay more attention to the ‘aftercare covenant’ in which the Child Care and Protection Board, probation services, Youth Care Agencies and youth institutions have made agreements regarding procedures, tasks and responsibilities, including financial agreements; Covenant National Framework for After Care, 24 August 2000; YCIA Evaluation 2004, p. 181-184 and 195.

September 2004 he even alluded to the introduction of compulsory aftercare.⁷⁰³ This raises questions regarding the legal basis and obviously regarding the appropriateness of compulsory programmes in this phase of the chain. Currently, the aftercare takes place as a voluntary programme based on the Ministerial Regulation Voluntarily Supervision Youth Probation.⁷⁰⁴ This regulation provides that the Child Care and Protection Board has the central direction of the aftercare. This board must be informed by institutions as soon as one of 'their' children participates in a reintegration programme. Youth probation can then start the supervision before the end of the child's stay in the institution.

De facto, a lot of progress in this regard can and should be made, in particular if one takes into account the figures regarding recidivism rates.⁷⁰⁵

4.11.3.6 Closing Remarks Facing Reality

Before concluding this paragraph one important closing remark must be made concerning the recidivism of children after their placement in youth institutions. The results of youth institutions in terms of recidivism rates are deplorable.⁷⁰⁶ Research over the period 1997 – 2000 reveals that approximately 70% of the children sentenced to deprivation of liberty in a youth institution were found to have come into conflict with the law again within four years after their release. Of this group, 62% had reoffended seriously (i.e. they had committed at least one crime carrying a maximum sentence of four years) within four years. 29% of this total group had committed less serious offences within four years. The children who had reoffended within four years after leaving the youth institution had been in conflict with the law again, four times on average. About 50% of the new offences were property offences not involving violence; about a third were offences involving violence. Just under half of these brushes with the law resulted in an unconditional custodial sentence. For some this implied a return to the youth institution; for most of them the adult prison had become the appropriate place.⁷⁰⁷

Based on these figures one cannot be very enthusiastic about the effectiveness of placing children in youth institutions; these figures and findings are at least not very encouraging. More recent figures until the year 2003 show in essence a similar

⁷⁰³ *Parliamentary Documents II* 2004/05, 240587 and 28 741, no. 112, p. 9. See also Youth Care Inspectorate 2006, p. 13.

⁷⁰⁴ Ministerial Regulation Voluntarily Supervision Youth Probation, 5328243/01/DJI 12 January 2005, *Government Gazette* 2005, 11.

⁷⁰⁵ Cf Annual Report The Council 2005, p. 22 and *Parliamentary Documents II* 2006/07, 29 815 and 24 587, no. 103.

⁷⁰⁶ A conclusion that has been confirmed by the Netherlands Court of Audit 2007 (see para. 4.1).

⁷⁰⁷ Wartna, El Harbachi, & Van der Laan 2005.

picture.⁷⁰⁸ In addition, the recent conclusions of the Netherlands Court of Audit in this regard are worrisome (see para 4.1).

The figures basically imply that those sentenced to a period in a juvenile institution have not been stopped from offending as an effect of special prevention, one of the objectives of the juvenile justice system. The more times a child has been in conflict with the law before being committed to a youth institution, the more likely he is to offend again. The length of stay also seems to have some effect on recidivism; children committed for three to six months have better outcomes when they leave than those committed for either shorter or longer terms. Furthermore, those committed under a treatment order reoffended less than those placed under other legal provisions, namely pre-trial detention, youth detention or placement under a family supervision order (child protection law).⁷⁰⁹

These high levels of recidivism urgently call for a broader and more critical approach of what one does and what one needs to do with children in conflict with the law. This certainly is not only a matter of the (programmes of the) youth institutions, but calls for improvement of the entire chain; youth institutions are just one link in that regard. A similar approach can be recognized under International Human Rights Law and Standards.

4.11.4 Conclusion

The realization of the key objectives of the juvenile justice system regarding children deprived of liberty and their reintegration into society, is dependent upon the institutional programme, which should be individualized and include *inter alia* education and contact with the wider community. It should furthermore be fostered through tailor-made reintegration programmes that enable the child to gradually return to society in order to play its constructive role.

The Dutch legal system in general meets these requirements and points of departure set by International Human Rights Standards. It provides a comprehensive daily programme in youth institutions (including compulsory education), while allowing institutions much discretion with regard to the content of the programme. In addition, it explicitly provides an individualized plan-based approach, which should be subject to periodic review. The child's (and his parents') participation in this regard is safeguarded, although it could use some improvements in particular regarding the possibilities to submit requests regarding (interim) evaluation of his programme or leave.

The YCIA furthermore introduced the STP as a reintegration programme that should be used as part of the child's deprivation of liberty and particularly aims at the child's transition from the institution into society. By embodying the STP in the

⁷⁰⁸ Wartna *et al.* 2006, p. 8.

⁷⁰⁹ Cf also Weijers & Liefwaard 2007b.

YCIA, it – theoretically – enables the authorities to use placement in the (closed) institution as an incentive during the child’s reintegration. Unfortunately, *de facto* the STP has serious implementation problems and thus far (2008) it has not really come off the ground; it certainly has not proven its significance as a fully fledged reintegration programme yet. In addition, aftercare is not supportive, although this currently seems to have caught the attention of the legislator, executive power and chain partners of youth institutions. This attention should primarily lead to the full recognition that after care is – as a minimum – as vital as the quality of institutional programmes for the realization of the objectives of placement in youth institutions. Since the outcomes in this regard are deplorable, an integral review of treatment of children in conflict with the law is required. Despite wonderfully looking theoretical initiatives (such as STPs), one shall (and should) in the end be judged on the outcomes of the system. Particularly given the high costs involved (estimated by the Netherlands Court of Audit at €250,000.- per child per year; see para. 4.1), the current results reveal that the Dutch government thus far has taken its responsibility insufficiently. This does not only disregard the interests of society, but moreover the rights of children treated under the juvenile justice system (art. 40 CRC).

4.12 STATE’S ACTION AND RESPONSIBILITIES

4.12.1 Introduction

As mentioned in paragraph 3.13 States’ obligations can roughly be divided into obligations regarding legislation, awareness-raising and training, and data collection and publication. The previous paragraphs addressed the implications of the Dutch legislation for children deprived of liberty in youth institutions. This paragraph’s objective is to provide some additional, general remarks, in particular regarding the benefits of legislation such as the YCIA, quality and training of staff and data collection.

4.12.2 Legislation

Dutch legislation specifically for children in youth institutions is young, even though legislation governing the juvenile justice system (and child protection) dates from the beginning of the 20th Century. The introduction of the YCIA introduced in 2001 marked the recognition of the legal status of children in youth institutions, which makes this statutory law of great significance.

Although the legislator has not been led solely (or primarily) by the will to implement International Human Rights Law and Standards and to fulfil its (moral) obligations in this regard, it is fair to conclude that he certainly has not been insensitive to the overarching legal framework (see para. 4.5). Taking into account the content of the YCIA and its implications for children deprived of their liberty in youth institutions, one inevitably gets the impression that the Dutch legislator (and

executive power) took its job seriously and delivered a comprehensive and detailed legal framework, that has given rise to the domestic obligation to implement International Human Rights Law and Standards into domestic legislation (*cf* GC No. 10, para. 88).

By doing so the legislator has provided national legal standards that represent the principles that the Netherlands has accepted and wishes to be bound by. Furthermore, it contributes to the substantiation of the provisions of international legal instruments like the legally binding but broadly formulated CRC and the detailed but as such non-binding JDLs provisions. Besides the legal value of the YCIA as binding statutory law, it serves as a framework of reference for awareness-raising and training of all those involved in and around youth institutions (see below) and as a tool for advocacy at the national level, to foster national policy making. That is to say: “These are the principles we have agreed upon. We are willing to protect the fundamental rights of children deprived of their liberty.” Last but not least, it shows that the Netherlands in essence aims at respecting the rights of the child and acknowledges the child as the holder of these rights.

Unmistakably, the legislator has set high demands on the enforcing authorities, most in particular to the youth institutions. As pointed out in paragraph 4.8 one should always take into account the local context, while setting the demands regarding both standards and implementation. Although this applies equally to all countries, the Dutch local context is one that leaves little (to no) room for excuses regarding the implementation of legislative standards set by the YCIA. In other words, in the Netherlands, one of the richest countries in the world, arguments for not meeting the standards set by both national and international law are hardly acceptable. Still, this study showed that there are more and less significant problems regarding the enforcement of the YCIA and related regulations, not infrequently caused by the (political) decision-making process and prioritization (including severe financial cutbacks). This sometimes causes serious tensions with International Human Rights Law and Standards, particularly in light of the Dutch government’s (positive) obligation to implement these standards (arts. 37 (c) CRC and 10 (1) ICCPR).

One should furthermore conclude that the Dutch legislator, but even more significantly the Dutch executive power has not been able to resist a certain regulation mania, by providing a large number of (administrative) regulations, circulars and all kinds of policy documents. As a result the YCIA legal framework has become a rather complicated framework, which has increased the demands on staff. It is not difficult to understand that staff members and administrations of institutions have experienced difficulties in learning and understanding the implications of the new legal framework. Pedagogical workers all of the sudden had to become part-time lawyers (see para. 4.5). Bartels blames the mania for rules and

regulations to a lack of trust and confidence in the people working in and around institutions.⁷¹⁰

Such a detailed web of regulations can also cause problems regarding implementation and enforcement. Legislation and regulations in this regard should primarily foster a climate in which the rights of the child are respected and protected. In addition, it should provide clarity and guidance for staff members and institutions' administrations. However, it should by no means deprive either the administration or the individual staff member from his possibilities to effectively work with the child within a pedagogical climate meant to realize the objectives of deprivation of liberty (see also para. 4.5).⁷¹¹

Finally, the interrelation of legislation such as the YCIA with other laws and regulations should be reiterated. Legislation never stands on its own; other legislation and its implications should never be lost sight of. It can be assumed that some of the issues regarding the implementation of the YCIA have been caused by the enforcement of instructions of other binding laws. For example regulations regarding the safety of staff members and regulations regarding working hours have impact on the implementation of the principle that children must participate in groups for a fixed number of hours. Although this also is a matter of coordination and learning how to cope with the different regulations, the legislator (and executive power) should take this into account as well.

4.12.3 Awareness-raising and Training

An adequate preparation for the introduction of a large legislative framework such as the YCIA has proven to be of eminent significance, as has the (constant) training of staff members as well as institutions' administrations. The YCIA Evaluation revealed that the institutions in general were prepared, although more than half of the questioned unit leaders found the preparations insufficient.⁷¹² This is worrying, because although the YCIA was not entirely new, it changed rules regarding the division of competences, child's participation, and further limitations of the child's civil rights and freedoms.⁷¹³ As mentioned in paragraph 4.5 and just above, the increased focus on the legal aspects of children's stay in youth institutions has caused difficulties for staff and tensions (or at least the experience of tensions) with the pedagogical climate as a whole. However, this is sometimes based on misinterpretations of the YCIA. For example, the law is not meant to deprive staff members of their ways of working as pedagogics and to work 'normally' with

⁷¹⁰ Bartels 2003, p. 168-170.

⁷¹¹ In this regard one should also carefully assess what one wants to regulate; see also para. 4.9.

⁷¹² YCIA Evaluation 2004, p. 187 and 193. The institution's partners, such as the probation service and child care and protection board) were not well prepared. The supervisory committees found that they were sufficiently prepared in general.

⁷¹³ YCIA Evaluation 2004, p. 192.

children. If one exercises the possibility to normally communicate with children or give instructions to them, there may be no need to impose a disciplinary sanction. The use of complaints procedures may not be needed if staff members manage to remain on speaking terms with children; if a child exercises his right to file a complaint this should not necessarily rule out regular ways of solving issues between him and staff. Moreover, if the child's complaint turns out to be founded, this should not be seen as if staff have failed. On the contrary, it should be used to learn from and to prevent such issues in the future. Despite the fact that the YCIA should be critically reviewed on certain specific issues that indeed do represent overregulation, the YCIA in essence provides for the boundaries of what is allowed and for minimum standards regarding institutional stay, including legal safeguards.

As mentioned in paragraph 4.5 the YCIA Evaluation pointed out that there seems to be a conflict between the wish for clear rules and clarity on the one hand and sufficient room for appropriate pedagogical work and treatment on the other. To cope with this conflict requires skills, which can vary from one staff member to another. In this regard (new) staff should be offered training and courses. Training and education has proven to be of vast importance and this certainly should also be regarded as part of the task of the government when introducing such a comprehensive and complex piece of (new) legislation.⁷¹⁴

Besides training and education, youth institutions should be provided with adequate and sufficient staff. According to recent annual reports of the Council, the overall treatment of children in general is good and children are in general satisfied in this regard – thanks to the efforts and constructive work of staff members, in particular group leaders.⁷¹⁵

However, a few developments should be mentioned here as well. First, is the large percentage of sickness absenteeism. The YCIA Evaluation concluded that the sector of youth institutions witnesses a large percentage of sickness absenteeism (from 10.7 % in 1999 to 9.5% in 2002) – a percentage that is higher than the average (between 7.8% and 6.8% in the period of 1999 – 2002) throughout the government in general. Although it has been improving since 2002 to a level of 7.7% in 2006⁷¹⁶ and the differences between institutions are large, the overall sickness absenteeism has certainly not contributed to the quality of the institutional work.⁷¹⁷ It for example resulted in children being locked up in their rooms in violation of the rule that children must participate in groups during the day (see para. 4.8).⁷¹⁸

⁷¹⁴ YCIA Evaluation 2004, p 188 and 193.

⁷¹⁵ See, e.g. Annual Report The Council 2005, p. 21.

⁷¹⁶ DJI Overview Figures Annual Reports 2002-2006.

⁷¹⁷ YCIA Evaluation, p. 90-92.

⁷¹⁸ See e.g. Annual Report The Council 2005, p. 21.

The second issue is related to understaffing which affects the vocational level of staff members. It is rather worrying that the mandatory qualifications for institutional staff have been relaxed. Staff are no longer required to have a vocational qualification at a higher education level.⁷¹⁹ In addition, there is not much legal guidance on the minimum requirements of (the composition of) personnel. One open norm can be found in article 78 YCIR providing that the institution is responsible for the staffing, in terms of quality and quantity, necessary to safeguard 'responsible remand or treatment'.⁷²⁰

Third, there is a particular shortage of youth psychiatrists, which is worrying in light of the duty to provide an adequate health system and to guarantee psychiatric treatment (*cf* para. 4.8).⁷²¹

The quality of staff is of eminent importance for the implementation of legislation such as the YCIA. This affects the presence of staff with an adequate vocational level and with the will and capacity to implement the law and other regulations. They should be supported by constant education and training.

Last but certainly not least, awareness-raising implies that the awareness of children and their parents should be fostered to the maximum possible extent. This requires primarily that they should be properly informed about their legal status (*cf* para. 4.7)

4.12.4 Data Collection and Publication

The CRC Committee has particularly stressed the significance of data collection for the administration of juvenile justice (GC No. 10, para. 98-99). The YCIA Evaluation revealed that it has proven to be rather difficult to find disaggregated figures and data regarding aspects of deprivation of liberty of children from public sources, such as annual reports and other official publications of the Ministry of Justice. The Ministry of Justice, in particular the National Agency for Correctional Institutions, has supported this study by providing additional data upon request. Although this has been very helpful, the conclusion has to be that much relevant data is registered but are not available to the public. In light of the transparency of the system, including governmental duties, this is a worrying conclusion.

⁷¹⁹ Even though it may be understandable in light of the shortage of staff and attempts to solve it.

⁷²⁰ One may wonder why the statutory YCIA does not provide for this. *Cf* e.g. rule 81 JDLs. One can derive from the YCIA and YCIR that there must be a director, a group leader, a behavioural expert and a teacher (see rule 25 YCIR) and that, e.g. spiritual caretakers and social workers should be available (art. 46 and 48 YCIA). In addition, the principle that children should stay in groups requires staff consisting of group leaders with specific knowledge and skills, required for the realization of the objectives of the stay in the institution; Explanatory Memorandum YCIA, p. 95.

⁷²¹ The Minister of Justice has announced that efforts will be made to increase both the level of education of staff and the number of specialized staff; *Parliamentary Documents II* 2006/07, 29 815 and 24 587, no. 103. *Cf* Youth Inspectorate *et al.* 2007 (see para 4.1).

Moreover, regarding some aspects there is no registration at all. There are, for example no figures regarding the use of force, restraint or screening instruments. Furthermore, regarding the quality of the available data the conclusion has to be that the some groups of data are unreliable. For example, data regarding the complaints procedures were insufficient and revealed differences between the data of the National Agency for Correctional Institutions and of the supervisory committees. In addition, data regarding STPs and release on licence were not disaggregated.⁷²²

It is recommendable to take measures to increase the usability and accessibility of the significant amount of available (but unpublished) data. This would not only contribute to the improvement of information regarding the implementation of *inter alia* legislation or regarding the quality of treatment of children in institutions. It would also better justify the workload imposed on institutions to register all kinds of data. In general, there should be a balance between the need for information and workload in this regard for those who have to register.⁷²³

4.12.5 Conclusion

In conclusion, the Dutch government has taken its legislative task very seriously and to a large extent in a way that reveals that it has taken the international human rights framework, but more importantly the rights of the child seriously. In addition, the establishment of this comprehensive legal framework has certainly contributed to awareness-raising in and around institutions. Nevertheless, one could raise the question whether the legislator and executive power have not regulated too much. Regarding certain aspects the answer should be positive. Furthermore, the implementation of such a legal framework needs time and requires education and training of staff. This should also be regarded as a task of the government when introducing legislation like the YCIA.

For the actual protection of the rights of the child, sufficient adequate staff is vital. So is information on implementation, for example through data collection. Although in general children are being treated well, there are some serious issues that deserve (constant) attention.

4.13 SOME CLOSING REMARKS

This chapter mainly addressed Dutch legislation and its implications for deprivation of liberty of children, in particular regarding children deprived of their liberty in Dutch youth institutions in the context of juvenile justice.

⁷²² YCIA Evaluation 2004, p. 92-93. The evaluation was troubled by the recent shift in registration. The government has decided to publish output data only from 2002, while beforehand many other figures were published as well. Comparison between the period before 2002 and the period after was therefore difficult, if not impossible.

⁷²³ YCIA Evaluation 2004, p. 194.

The imposition of deprivation of liberty is founded in Dutch statutory law, the CCP and CrimCo, which largely is in conformity with International Human rights Law and Standards, although lacks child-specificity in the pre-trial phase and the child-specific youth sentences are not free from practical challenges. The issue of waiting lists is a particular flaw that is unacceptable under International Human Rights Law. Nevertheless, in a system which to a large extent diverts children from the justice process and uses community sanctions rather than (unconditional) deprivation of liberty, the requirements set by International Human Rights Law (in particular art. 37 (b) CRC) are generally met (see for more details paras. 4.1-4.4 and Chapter 5).

Paragraph 4.5ff analyzed the legal status of children deprived of their liberty in youth institutions. In this regard the greatest achievement is that the Netherlands has drawn up a specific statutory act for these children, the YCIA. The significance is that the YCIA provides a statutory legal framework, which sets minimum standards for the quality of living conditions in youth institutions based on the general principle that each child in principle remains entitled to all human rights and fundamental freedoms. These rights may only be limited if required for the realization of the objectives of placement in a institution, that is: security, upbringing and reintegration (i.e. the doctrine of minimal limitations). If applicable, individual treatment can also be objective. This approach corresponds with the approach proclaimed by International Human Rights Law (art. 37 (c) CRC; art. 10 (1) ICCPR) and as elaborated in detail in International Human Rights Standards, in particular in the JDLs.

Despite some significant issues of implementation and enforcement (for details see the separate paragraphs and conclusions presented therein), in general the conclusion is justified that the YCIA's principle objective has been realized, that is the strengthening of the legal status of children in youth institutions. This is particularly interesting because where International Human Rights Standards merely provide instructions regarding procedural safeguards (remedies and inspection mechanisms) and the protection of rights of children, in particular concerning (far-reaching) limitations of their human rights (i.e. the use of force or restraint and disciplinary measures), the YCIA has substantiated these instructions. This arguably is its most significant value. Regarding limitations of children's human rights, the YCIA provides legal safeguards and remedies in order to protect unlawful or arbitrary treatment. It forces institutions to an individual approach in the sense that limitations can only be imposed on an individual basis of a decision in general made by the director of the institution or his deputy (i.e. from someone at a certain distance), a decision which the child can remedy by filing a complaint before an independent and competent authority. This is the key to the legal protection of children in institutions. Although it certainly is not free from challenges and the current legal embedment may to some extent have deprived staff members (in particular group leaders) too much of competences to respond to children's behaviour immediately, it in essence builds in a tailored individual assessment

conducted by a more objective person which is subject to independent monitoring. Such a system has the potential to optimally combine objectivity, responsibility and transparency, while not losing sight of the often tough performances generally conducted by adequate staff which primary challenge is to establish and maintain a healthy pedagogical climate in which children can develop themselves. The conclusion is justified that the YCIA, despite its challenges and shortcomings, in general represents a legal framework that has acknowledged the need to strive for this delicate balance by providing minimum conditions, a tailored individualized plan-based approach (even though children must stay in groups), which in addition recognizes the rights of children deprived of their liberty and placed in the custody of youth institutions. In this regard the Dutch legislator has provided an interesting example of statutory domestic legislation largely in conformity with International Human Rights Law and Standards. This chapter has tried to contribute to a better understanding of the content and implications of this example in theory and in practice.

The overall positive conclusion of this chapter will be used to provide further inspiration regarding the implementation of International Human Rights Law and Standards at the domestic level (see Chapter 5). Before doing so, one final remark should be made. As mentioned in paragraph 4.1 and occasionally in the course this chapter, the Dutch system of youth institutions is in transition. After more than a century of 'joint operations' of – basically – the most far-reaching forms of juvenile justice and child protection (i.e. placement in a youth institution) the Dutch government has decided to split the two systems and to provide for separate institutions for children under child protection law. This transition is scheduled for the period 2008-2010; separate legislation has been drawn up, which entered into force on 1 January 2008 and is clearly founded on a less-regulative approach (compared to the YCIA). These recent developments should be followed closely and carefully. In light of the general conclusions mentioned above, this should be done in the first place because the children placed in facilities for closed youth care are deprived of their liberty, which places the government under the positive obligation to grant them treatment in accordance with article 37 (c) CRC; children in closed youth care are entitled to the same protection of their rights as children in youth institutions. At the same time, this development should be followed carefully, because one should avoid at all costs that due to or related to the increased attention to the (new) institutions for closed youth care, too little attention will be given to children left in youth institutions. Given the recent critical assessments on the quality (and safety) of living conditions in youth institutions, individual treatment and reintegration programmes and aftercare, it would be unacceptable to leave these children to their fate. Therefore, one can only hope that the government takes its full responsibility to safeguard the treatment of these children who are so entitled under International Human Rights Law.

